SUPREME COURT, U. S. 73-611

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-478

ABRAHAM E. FREEDMAN,

Petitioner,

v.

JAMES M. MORRISSEY, JOSEPH PADILLA, and RALPH IBRAHIM, Individually and on Behalf of the Members of the NATIONAL MARITIME UNION OF AMERICA,

Respondents and Cross-Petitioners,

and

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN E. SEGAL and LEON KARCHMER,

Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Cross-Petitioners, James M. Morrissey, Joseph Padilla and Ralph Ibrahim, on behalf of the members of the National Maritime Union of America (NMU) (plaintiffs) respectfully pray that a writ of certiorari issue to review certain portions of a judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on June 18, 1973.

Opinions Below

Prior proceedings are reported at *Morrissey* v. *Curran*, 302 F. Supp. 32 (SDNY, 1969); affirmed, 423 F.2d 393; cert. denied, 399 U.S. 928 (1970), 400 U.S. 862 (1970); on remand, 336 F. Supp. 1107 (SDNY, 1972); 351 F. Supp. 775. The decisions of the District Court dated July 3, 1969 (2), June 29, 1972 (reversed, 423 F. 2d 393, *supra*) and November 15, 1972 are not officially reported. The opinion of the Court of Appeals dated June 18, 1973 is not yet officially reported. All opinions not printed in petitioner's appendix are printed in cross petitioners' supplemental appendix.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered June 18, 1973. A timely petition for rehearing and for rehearing *en banc* by plaintiffs was denied on July 17, 1973 (SA 45).* A petition for rehearing filed by the defendant Perry was granted on August 6, 1973 (SA 46). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Does a panel of a Court of Appeals have the power to overrule another panel of the same court which had made a binding decision on a prior appeal in the same case?

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* References to the petitioner's appendix filed in this Court will be preceded by A.

References to the cross petitioners' supplemental appendix filed in this Court will be preceded by SA.

References to the joint appendix filed in the Court of Appeals will be followed by a.

2. When a pension plan is created by the membership of a labor organization for the exclusive benefit of the elected union officers, may the president of the union successfully appoint persons as officers to enable them to participate in such plan?

3. May a person be appointed to office in an international or national labor union notwithstanding 29 U.S.C. § 481(a)?

4. Should a union officer, who has received notice that an unlawful payment of $222,200.00 is about to be made from union funds and does nothing, be exonerated from liability simply because he did not himself direct such payment?

5. Does a union officer who is on notice that a substantial unlawful payment is about to be made from union funds to his good friend have an affirmative duty to prevent such payment when he has power and opportunity to do so?

6. May a trustee of a union pension fund who has made an unlawful payment of $115,000 in April of 1966 and who is placed on notice in May of 1969 that such payment was unlawful, intentionally stand idly by for three years and let the statute of limitations expire against his trust without incurring a personal liability for his deliberate failure to act?

7. Did the Court of Appeals exceed its authority in making a finding of fact on an issue upon which the District Court did not pass—which finding was not supported by the record and which was contrary to it?

Statutory Provisions Involved

The statutory provisions involved are 29 U.S.C. §§ 501(a) and (b), 431 and 481(a). These provisions are printed in the supplemental appendix (SA 40, 41 and 90).

Statement of the Case and Outline of Previous Proceedings

In May of 1968 the plaintiffs*, who are members of the NMU, in good standing, became aware that certain persons were being included in the NMU Officers' Pension Plan though they were not elected NMU officers. On May 17, 1968, one of the plaintiffs, James M. Morrissey, made demand on the union, its officers and governing body for an accounting and restoration of all damages for losses, liabilities, expenses and expenditures suffered by the National Maritime Union of America by reason of the purported coverage of persons not elected to NMU office (non-officers) in the NMU Officers' Pension Plan (SA 48-49).

When NMU failed to respond, the District Court granted the plaintiffs leave to bring this action. Summary judgment was entered, on the plaintiffs' motion, directing the defendants to account for and refund all money paid to or for the account of non-officers and enjoining any further such payments.

All the defendants appealed and the Court of Appeals for the Second Circuit affirmed the interlocutory judgment which had directed the defendants to account.

The defendants then filed two separate petitions for writs of certiorari, both of which were denied by this Court. [399 U.S. 928 (1970) and 400 U.S. 826 (1970)]

The District Court upon remand after trial of the remaining issues entered judgments in favor of the NMU and

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* To reflect the actual alignment of the parties before this Court and for the sake of clarity, the parties are here referred to as plaintiffs and defendants.

against the NMU Officers' Pension Fund for $674,222.60; against the defendants Perry and Freedman personally for $263,307.00 and $272,740.50 in favor of the NMU Officers' Pension Fund respectively.

Appeals were then taken to the Court of Appeals by all the parties except the defendants Karchmer and Segal. The plaintiffs' appeal raised several issues, including: (1) the limitation of the judgment against the NMU Officers' Fund in favor of NMU to the sum of $674,222.60 although the parties had stipulated that $1,628,921 had been paid to the officers' fund for non-elected persons*; (2) the district court's failure to surcharge the trustees for permitting the statute of limitations to run against their trust in April, 1973 by intentionally failing over a three-year period of time to make any effort to recoup the unlawful payment of $115,000 they had made to Irving Brauch in 1966 after they had been placed on notice in May of 1969 that such payment had, in fact, been unlawfully made; (3)

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* Stipulation of amounts paid to the NMU Officers' Pension Fund for non-elected persons.

	Salaries	*Contribution*	*Interest*
Total 1/8/71	6,388,006	1,689,597	385,972
Adjusted as 7/7/71	113,575	31,729	2,605
	6,274,431	1,657,868	383,367
Agreed	111,337	28,947	2,787
	6,163,094	1,628,921	380,580
Interest Adjusted 6/1/70 to 7/7/71	—	—	57,011
	Total Interest		437,591
	Contributions		1,628,921
			2,066,512
		to 8/23/71	14,661
			2,081,173

the district court's refusal to condemn the immediate payment of $460,365 by Curran and Wall for the very same improper and unauthorized purposes which prompted the Court to mandate the return of the $674,222.60 to NMU in the first instance; and (4) the refusal of the district court to impose liability on Curran and Wall under 29 U.S.C. § 501 for their failure to prevent the unlawful, lump-sum payment of $222,200.00 to Perry, a non-officer, out of the officers' pension fund after receipt of plaintiffs' notice that such unlawful payment was about to be made.

Reasons for Granting the Writ

(1)

The panel of judges on the second appeal undertook to overrule the decision made by the panel of judges on the prior appeal and held that the Officers' Plan was not limited exclusively to elected officers but included some who had been simply designated by Mr. Curran.

This was not only unjustified on the record but was also in direct conflict with the decision made by a different panel on the prior appeal. This conflicting decision "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." (Rule 19, Revised Rules of the Supreme Court of the United States.)

On the prior appeal, the Court of Appeals affirmed the interlocutory judgment which had directed the defendants to account for all moneys paid out to or for the account of non-officers. *Morrissey* v. *Curran*, 423 F.2d 393 (Lumbard, Chief Judge, Danaher and Anderson, Circuit Judges; opinion by Anderson, C.J., Danaher, C.J., dissenting). That decision limited the governing document to the Plan as approved by the members on February 16, 1953. In describing that instrument Judge Anderson said (423 F.2d 393, 395, SA 3):

> "On February 16, 1953, the trustees adopted a plan whereby pension rights accrued to the various *elected* officials of the Union, including the president, secretary, treasurer, vice-president, national port committee member, branch agent, field patrolman, and patrolman. No non-elected employee of the Union was included under its coverage." (Emphasis added.)

The Court of Appeals held that all subsequent attempts to amend the February 16, 1953 Agreement and Declaration of Trust and Pension Plan were void. *Morrissey* v. *Curran*, 302 F. Supp. 32, aff'd 423 F.2d 393. According to its express terms the trust was established by NMU "for the exclusive benefit of its elected officials" (SA 51) and the plan defined "term of office" as the period of time an officer is "elected to serve" (SA 63).

There was no authority reposed in anyone to add persons who were not elected to office by the membership—regardless of what title may have been conferred upon them. Thus the membership retained the right to say who would benefit by this Plan.

Judge Bonsal recognized this initially when he paraphrased the complaint to equate "non-officers" with persons "who were not elected officers of NMU". *Morrissey* v. *Curran*, 302 F. Supp. 32, 33, SA 25:

> "* * * The complaint alleges that defendants allowed the Pension Plan to be amended in 1961, so as to include as participants designated employees of the NMU, *who were not elected officers of the NMU (non-officers)*, in violation of the NMU Constitution then in effect; and that the amendment was designed to siphon NMU funds to the non-officers who were not authorized to receive them." (Emphasis added. Parenthetical matter in original.)

Obviously the district court intended to define "non-officers" as employees "who were not elected officers".

It had already equated "non-officers" to employees who were not elected officers when it directed "the Trustees to return to the NMU all moneys received by them for the benefit of non-officers" (302 F. Supp. 36).

Judge Anderson, in affirming the district court, had understood what the district court intended when he said that under the Officers' Plan* "pension rights accrued to the various elected officials of the Union" and "No non-elected employee of the Union was included under its coverage" (SA 3).

The decision on the prior appeal thus removed the vice of allowing Curran to appoint those who would participate in the Plan. The Plan was a lucrative one. The membership had adopted it for the "exclusive benefit of its elected officials" (SA51). This was the wish of the membership.

Now, on the second appeal, the same Court by a different panel has held that the Plan was not limited to "elected" officers. The strange thing is that Judge Hays, on the second appeal, expressly recognized that the 1961 and 1964 amendments to the plan had been declared void on the prior appeal (A38). That being so, there was no longer any document in existence which even purported to authorize the inclusion of non-elected persons in the plan adopted for elected officials.

Although Judge Hays said that the prior panel had not precluded him from including persons who had not been elected to office (A39) in the officers' plan, that issue had in fact previously been decided.

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* It is to be emphasized that plaintiffs never have sought and do not seek to disturb the pension coverage of administrative employees in *bona fide* pension plans reached under collective bargaining agreements. (See *Morrissey* v. *Curran*, 423 F.2d 393, 395, footnote 1a (SA 4). Incidentally, the designated "patrolmen", "field patrolmen" and "agents" involved here, like William Perry, are eligible to receive pension benefits under the NMU Deep Sea Pension Fund and unless this petition is granted will receive two pensions (*infra*, p. 12).

The plaintiffs filed a petition for rehearing which contained the suggestion, that such rehearing be heard *en banc*. That petition was denied (SA 45). None of the judges who participated in the decision on the first appeal had a right to vote on whether or not and *en banc* hearing should have been held. Both Circuit Judge Anderson and former Chief Judge Lumbard have retired and are no longer active Circuit Judges. Judge Danaher is not only retired but also is not a judge of the Second Circuit.*

Situations such as this may, unless corrected, create a serious hindrance to the effective administration of the law. In other words, litigants should not be encouraged to pursue a second round of appeals in hopes that a second panel might be inclined to disregard the decision of an earlier panel.

The existence of this intracircuit conflict is a valid and compelling reason for granting the writ requested. *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507 (1950); *Maggio* v. *Zirtz*, 333 U.S. 56 (1948).

(2 and 3)

The decision sought to be reviewed validates the appointment rather than the election of certain NMU officers; to wit, "patrolmen", "field patrolman" and "agents", and is directly at odds with Title 29 U.S.C. § 481(a) (SA11) and with *Wirtz* v. *NMU*, 284 F. Supp. 47, aff'd 399 F.2d 544 (Second Circuit, 1968, opinion by Timbers, J., Moore, C.J. concurs, Hays, C.J. dissents).

In *Wirtz* the district court held that Title 29 U.S.C. § 481(a) required that patrolmen, agents and field patrol-

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* Had an *en banc* hearing been held, Judges Anderson and Lumbard, thought retired, would have been eligible to have participated in such hearing.

men be elected to their offices and specifically said (284 F. Supp. 47, 67):

> "This court construes 29 U.S.C. § 481(a) to mean that *all* officers of a union must be *elected* and that they must be elected at least every five years." (Emphasis in original.)

Judge Hays disagreed with the majority in *Wirtz* and, in spite of the clear and explicit language of the statute, he expressed, in the following language, his strong displeasure at the congressional direction that all union officers be elected by the rank-and-file and not appointed. *Wirtz* v. *NMU,* 399 F.2d 544, at page 553:

> "I fear that, in trying to keep the courts from taking over lock, stock and barrel the internal operation of labor unions, I am fighting a fairly hopeless rearguard action. But, I am not yet compelled by any Supreme Court decision on the issue to accept the position that a union cannot provide for the appointment rather than the election of what are here called patrolmen * * *"

Obviously Judge Hays allowed his personal philosophy to affect his thinking when he undertook to overrule the prior panel of the same Court and to flaunt the express direction of an act of Congress. He was quite aware of the problem presented. He said (A39):

> "Plaintiffs contend that the judgment of the district court is inadequate because it does not include moneys paid on account of the NMU officers who were appointed rather than elected."

Incidentally, Judge Hays misconceived the plaintiffs' contention. The plaintiffs contended that the judgment was inadequate because it did not include money which had been paid for the account of all "non-elected" persons, whether characterized as officers or otherwise. The Plan

was created solely for persons elected to office. Persons appointed by Curran could not be paticipants regardless of the title Curran had conferred upon them. The Labor Management Reporting and Disclosure Act (LMRDA) became law in 1959. All the payments here involved were made after that date. Under Title 29 U.S.C. § 481(a) (SA40) only elected persons could qualify as officers.

With the concurrence of the other members of his panel, Judge Hays reached the conclusion that Curran, as President of NMU, could properly appoint persons to be "officers" (A40) in disregard of the express provisions of Title 29 U.S.C. § 481(a).

(4 and 5)

This proceeding involves questions of exceptional importance—relative to honest unionism and the application of the LMRDA to achieve that end. In the past all the Federal Courts have been especially vigilant in the protection of seamen from the several oppressions of their calling. But Judge Hays' most recent decision in the instant case, unless reviewed, will leave not only the seamen but also all rank and file members of organized labor organizations vulnerable to the danger of corrupt labor practices by rendering the fiduciary provisions of the LMRDA meaningless. This issue is of overwhelming importance to the public at large as well as to the parties involved in this litigation.

This is not the usual case where the good faith of a union official is at issue for past payments found to have been wrongful. Here, the plaintiffs gave written notice to Curran and to Wall that payments to non-elected officers, including William Perry, from the officers' Fund would be unlawful and unauthorized. The plaintiffs demanded that such payments be stopped and appropriate actions taken (SA 48-59).

Curran and Wall knew that the unlawful payment to Perry was in the works. They had the power to prevent

it. If Curran had lifted his little finger in protest, his good friend and best man, Perry, at the ripe age of 42 years, would not have walked away with $222,200 of pension funds which did not belong to him in addition to the lump sum of $176,602.61 (850a) ($104,595.16 after withholding) from NMU general funds and in addition to a Deep Sea pension of $250.00 a month for life.*

But Curran's action in signing the check to the Officers' Fund in the sum of $41,250.01 in December, 1968 illustrates his determination to see to it that Perry would receive his payment out of the officers' fund regardless of the legality of such payment.

The District Court in *Morrissey* v. *Curran*, 351 F. Supp. 775, 784 (Bonsal D.J.) found (A32-33):

> "Curran knew that the plaintiffs had requested NMU to institute this action to recover monies paid to the Officers Pension Fund for the account of non-officers on the ground that such payments violated the NMU constitution, and that it was charged that Perry was a non-officer. Curran was in a position of trust to expend NMU funds only in accordance with the NMU constitution. Curran also knew or should have known that the Agreement and Declaration of Trust did not authorize the prepayment of contributions to the Officers Pension Plan. Nevertheless, on December 18, 1968, when he fired Perry for the first time, he instructed Breit to prepare a check from NMU funds in the amount of $41,250.01 to be paid to the Officers Pension Plan for Perry's account, and on the following day he signed the check, which was then forwarded to the Officers Pension Plan. * * *

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* Judge Bonsal in his unreported decision of June 29, 1972 said (9A):

> "So despite being fired at 9:30, it wasn't a bad day for Mr. Perry."

> "• • • The evidence indicates that *Curran dominated the people who had anything to do with the payment from the Officers Pension Plan to Perry.* Karchmer testified, 'Well, to go in to Joe [Curran] is a very fearful process.' • • • Undoubtedly, Curran used the power of his office to get Perry everything that was coming to him on January 16th. However, there is no evidence that on January 16th Curran directed the payment to Perry of $222,200 or directed Freedman to furnish the legal opinion *to the trustees.*" (Emphasis added. Bracketed matter in original.)

Indeed Curran, himself, never claimed that he consulted counsel or relied on any legal advice. No excuse was offered for his failure to prevent the unlawful payment to Perry.

Unless these findings of fact by the district court were overlooked, it is difficult to understand how Judge Hayes ever reached the conclusion that "the record shows that Curran and Wall acted in good faith, relying on the advice of the union's general counsel" (A43) or that the finding that Curran "dominated the trustees" was merely an "argument" (A44):

> "Plaintiffs now *argue* that Curran dominated the trustees and it was through this power that the payment to Perry was made." (Emphasis added.)

Curran and Wall breached their fiduciary duty to the membership in failing to prevent the payment to Perry of $222,200. This comes into sharper focus in the light of Judge Bonsal's findings that Curran "dominated" the trustees and that Curran was a fiduciary of the NMU funds including the funds in the NMU Officers' Pension Plan (A32):

> "For the purposes of Section 501(a), the funds paid by NMU to the Officers Pension Plan and by it to Perry were funds of NMU."

Curran and Wall were experienced and sophisticated labor union leaders. They were with Perry and behind him all the way—from beginning to end—regardless of the consequences. They required no legal opinion to induce them. They wanted Perry to have that $222,200. They not only failed to prevent the unlawful payment but also did all in their power to sustain it.

In fact, after the May 23, 1969 decision of the district court, which granted plaintiffs' motion for summary judgment and adjudicated the Perry payment unlawful, Curran and Wall went so far as to frantically call the National Council together to amend the NMU Constitution retroactively. Had they succeeded in that bold move, Perry would have been home free—richer by $222,200.* But that amendment was declared void on the prior appeal.

They supported Perry in every conceivable way after he had been paid off. They furnished him with legal counsel and joined with him in all the briefs and papers filed on his behalf from the time this action was instituted in the district court right on through the time this Court denied the defendants' first petition for a writ of certiorari.

Surely all that should have been persuasive and overwhelming evidence of the interest Curran and Wall considered foremost. It was not NMU's interest. In fact, these actions constitute additional breaches under the Act. Section 501 cautions union officers that they should:

> "* * * refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or *personal* interest which conflicts with the interests of such organization * * *" (Emphasis added.)

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* This payment had not been reported to either the membership, or to the Secretary of Labor [29 USC § 431(b)(3)]. Had plaintiffs not succeeded on the first appeal, the membership never would have even known how much Perry really got.

(6)

The District Court found as a fact that "the trustees had made unlawful pension payments to employees in the amount of $371,271." That finding was acknowledged by Judge Hays (A39). Among those payments was a payment of over $115,000 to Irving Brauch. The district court held that (except for the payment to Perry) these unlawful payments had been made by the trustees prior to the plaintiffs' notice and for that reason the trustees were not to be surcharged for those payments.

But it seems plain that a trustee having made an unlawful payment has a duty to make every reasonable effort to replenish his trust after receipt of notice that the initial payment had been unlawfully made.

The notice that unlawful payments had been made to Brauch and to others came in a most dramatic form—the decision of the district court on May 23, 1969. After receipt of such notice, the trustees sat back for a period of three more years. They deliberately and willfully failed to take any action to collect the $115,000 which had been unlawfully paid to Brauch. They thereby allowed the statute of limitations to run against them on April 6, 1972 (CPLR 213[2]). It is for this deliberate failure to act that the trustees should have been surcharged if not for the initial unlawful payment made by them to Brauch.

Neither of the courts below spoke on this issue. It does not appear that either of them addressed itself to the issue presented by the plaintiffs—the liability of the trustees based upon their deliberate failure to attempt to collect the initial unlawful payment to Brauch—thereby permitting the statute of limitations to run against them.

The trustees may not be exculpated from the consequences of such a wilful omission. Allowing their claim against Brauch to become uncollectible through their inaction was intentional. Indeed, trustee Freedman, an

attorney himself, and familiar with the statute of limitations and the law on the subject, testified that he had no interest in pursuing Brauch (527-528a):

"Q. Did you engage any other attorney to start a suit on behalf of the trustees to collect that money? A. I didn't.

Q. Are you interested in collecting that money?

• • •

The Court: I think if Mr. Freedman has any views on it, I will let him answer that.

The Witness: I really haven't your Honor."

90 *Corpus Juris Secundum,* Trusts § 263, provides at pp. 324-325:

"§ 263. General Powers and Duties

A trustee has the exclusive right and duty to proceed, within a reasonable time, by suit or other legal proceeding, if necessary, to collect or reduce to possession all claims due, and all property and assets belonging to, the trust estate; and a failure to perform these duties with due diligence renders him personally liable for the resulting loss.

It is the right and duty of the trustee, and of him alone, to proceed promptly, or within a reasonable time, by suit, or other legal proceeding, if necessary, to collect or to reduce to possession the property and assets belonging to the trust estate, and to collect all claims due the estate. A failure to perform these duties, with due diligence, renders the trustee personally liable for the resulting loss."

See also: *Scott on Trusts,* The Administration of the Trust, § 177, pp. 1424-1427; *Village of Brookfield* v. *Pentis,* 101 F.2d 516, 521, 522 (Circuit Court of Appeals, 7th Circuit, 1939); and *Grodsky* v. *Sipe,* 30 F. Supp. 656 (District Court, Eastern District of Ill., 1940).

(7)

The decision below creates or at least permits a subtle erosion of the power of the federal courts—*vis-a-vis* the power of a labor union leader—Joseph Curran.

On or about February 2, 1972 a payment of $674,222.60 was made by the NMU Officers' Pension Fund to the NMU to satisfy the judgment plaintiffs had obtained in this action.

In the same month NMU, through Curran and Wall, paid Alvin Shapiro as trustee $460,365. This money was paid to Alvin Shapiro for the very same improper and unauthorized purposes which had been the basis for the $674,222.60 judgment in the first instance. The new payment was made to secure pensions for the persons eliminated from the elected officers' plan by Court order. In other words, the circle had been completed—the money paid out, then restored by order of the Court, and finally paid out again for the original unlawful purpose.

There were no bones made about it.

Curran testified at the trial that this Shapiro trust was for the benefit of the persons who had been deprived of their share of the Officers Pension Fund by the order of this Court (616a):

> "Q. Mr. Curran, did you report * * * at the National Convention that you would see to it that these payments (pension payments which the Court had held were wrongfully made to non-officers) would be made whatever the court might rule?
>
> * * *
>
> The Witness: I said that, Your Honor." (Parenthetical matter added.)

Curran went on to say:

> "The Witness: We set up another pension plan in accordance with the instructions we had from the

> National Council that took into consideration those people who were barred from being a part of the Officers' Pension Plan." (610a)

Curran testified that the new Plan was in effect (610-611a). Wall testified the money had been paid out to Alvin Shapiro as trustee (776-777a).

The new trust gave Curran a free hand with the fund. It provided in part (SA77):

> "* * * The amount and nature of the benefit program to be provided by the Plan and conditions of payment shall be determined by the National Office (the handful of national officers (5) of NMU controlled by Curran) of the Union and furnished in writing to the Trustee * * *" (Parenthetical matter added).

This was precisely in line with Curran's earlier efforts to circumvent the order of the district court (by amending the NMU Constitution retroactively) which efforts were declared void by the Court of Appeals on the prior appeal.

Mr. Curran's acts spoke louder than his words, but his words clearly expressed his intention to circumvent the court order right from the outset. He said (806-808a):

> "Now to get back to the purpose of this Special Meeting, I think you have been talked to, most of you, about what happened here in the Federal Court in the District, Judge Bonsal handed down a Decision that there is no authorization to include in the Officer's Pension Plan non-elected officers. * * * Now, the case, of course, is being appealed. It had to be appealed because it's a bad piece of law. * * *
>
> The question is, the resolution that is the clearest one is the one that we will work with to amend the Constitution to protect these people. * * *
>
> "* * * that's as far as we can go and then the constitution will be amended and that will take care of the

situation. Otherwise, if it is not amended, it would then become the job of the national officers, particularly the President, to call in these people and make a contract with each of them as individuals to protect their rights and, of course, under contract of that type it wouldn't be for pension, you see, but it would be a service credit contract; one in which they would protect their service credit for each year worked. You would give them a percentage as a deferred income, so to speak, which is the new slogan used by executives. I saw the Wall Street Journal and one of the other papers and saw that Henry Ford got $200,000 in wages one year and $400,000 in deferred income. So that this is a new way to handle these things.

• • •

"So I have assured them all that even if the constitution were (not) amended, that I felt that we would undertake to make an individual contract with each one of them in behalf of the union seeing that their rights were protected."

The District Court after hearing this evidence and after the defendants had rested directed that the original of the new trust agreement be produced (786a). In response, Mr. Epstein, Curran's counsel, wrote a letter dated July 20, 1973 (55-56a) which stated that the trust agreement had not yet "been executed by the parties," but that nonetheless on February 29, 1972, $460,365.00 had been deposited in an interest bearing account. As of June 8, 1972 the account had "increased to $476,499.35 by reason of interest earned • • • and deposits therein for the months of March, April and May."

The District Court did not speak on this subject. Despite that silence Judge Hays undertook to approve this segregation of funds from the General Fund of the union and (apparently relying on the self-serving, hearsay state-

ments contained in the unsworn Epstein letter, *supra* upon which plaintiffs had no opportunity to cross-examine) made his own findings of fact. He said (A44):

> "• • • First, the union never paid the money to Shapiro; the trust agreement was never executed. Even if the money had been paid, the proposed pension plan for current employees was for future payments. Consequently, the establishment of the fund was permissible and not prohibited by this court's prior decision."

In making these original finding Judge Hays could not have considered the following facts adduced at trial:

1. Wall, the Secretary-Treasurer of NMU—the man who knew—testified that the money had been paid out. That testimony had not been contradicted.

2. Such payment of $460,365.00, as Judge Hays himself observed, was made on the strength of an unexecuted document. How could anyone justify the payment of almost one half million dollars of union funds without the protection of a writing?

3. The NMU Constitution, Article 17, Section 1 provides:

> "All monies of the Union shall be maintained in a General Fund."

4. The "NMU Statement of income and expenses of the General Fund for all Ports and National Headquarters for the month of February, 1972" carried $626,260 as the operating expenses of the National Headquarters for that month (SA75). Mr. Wall testified that a substantial part of that sum went into the new trust (776-777a).

5. Curran, the President of NMU, testified that the plan was in effect. That testimony had not been contradicted.

6. The new trust, itself, does not indicate who is to participate in it, nor does it limit the extent of the participation (*supra*, p. 18). On its face, it is no *bona fide* pension plan. It is merely a vehicle designed to give Curran *carte blanche* to siphon NMU funds in large sums to the select persons (including his son) excluded by the court order —without reporting the payments either to the membership or to the Secretary of Labor in accordance with LMRDA, Sec. 201 [29 U.S.C. § 431 (b)(3)]. A seaman would call it: "A raid on the treasury."

7. The NMU Constitution, in effect, at the time of the payment, did not authorize the creation of such a trust.

In short the facts as found by Judge Hays with respect to this payment of almost a half million dollars of NMU funds are shockingly wrong and totally devoid of evidentiary support. In fact, they are contrary to all the evidence adduced at the trial. See *Washington* v. *U. S.*, 357 U.S. 348 (1957).

Again this procedure "so far departed from the accepted and usual course of judicial proceedings * * * as to call for an execise of this Court's power of supervision" (Rule 19, *supra*, p. 6).

Conclusion

For the foregoing reasons this cross petition for a writ of certiorari limited to the issues presented should be granted and it is respectfully suggested that under the circumstances this Court may well deem a summary reversal on these issues appropriate.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-478

ABRAHAM E. FREEDMAN,

Petitioner,

v.

JAMES M. MORRISSEY, JOSEPH PADILLA, and RALPH IBRAHIM, Individually and on Behalf of the Members of the NATIONAL MARITIME UNION OF AMERICA,

Respondents and Cross-Petitioners,

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN E. SEGAL and LEON KARCHMER,

Respondents.

CROSS-PETITIONERS' SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARTHUR E. MCINERNEY
Attorney for Cross-Petitioners-Respondents
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APPENDIX A

Court of Appeals Opinion with Dissent, dated February 20, 1970.

LUMBARD, *Chief Judge*,
DANAHER* and ANDERSON, *Circuit Judges*.

Appeals from a denial of defendants' motion for summary judgment and a granting of plaintiffs' cross-motion for summary judgment, but denial of plaintiffs' petition for an injunction, by the United States District Court, Southern District of New York, Dudley B. Bonsal, *Judge*, holding that pension payments made to certain employees of National Maritime Union of America were, under the Union's constitution, improperly made. Affirmed in part and reversed and remanded in part.

CHARLES SOVEL, Esq., New York, N. Y. (Abraham E. Freedman, Esq., New York, N. Y., on the brief for Defendants Joseph Curran, Shannon Wall and William Perry), *for Defendants-Appellants Curran, Wall, Perry and Abraham E. Freedman.*

ROY L. REARDON, Esq., Simpson, Thacher & Bartlett, New York, N. Y., *for Defendants-Appellants Martin E. Segal and Leon Karchmer.*

---

* John A. Danaher, Senior Circuit Judge of the District of Columbia Circuit, sitting by designation.

Appendix A.

ARTHUR E. MCINERNEY, Esq., New York, N. Y. (Duer & Taylor, New York, N. Y., on the brief), *for Plaintiff-Appellees.*

ANDERSON, *Circuit Judge:*

This case arises under § 501 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. § 501 (1964), and concerns the propriety of certain payments made into the Officers' Pension Fund of the National Maritime Union (NMU). The plaintiffs, James M. Morrissey, Joseph Padilla, and Ralph Ibrahim, have been members in good standing of the NMU since approximately 1950. The defendant Joseph Curran is the national president and the defendant Shannon Wall is the national secretary-treasurer of the NMU, both elective positions. The defendant William Perry is the recently retired assistant to the president of the Union, a non-elective position. The defendants Abraham E. Freedman, Martin E. Segal, and Leon Karchmer are the trustees of the NMU Officers' Pension Plan.

The structure of the NMU and the powers and duties of its officers and various internal governing bodies are set out in the Union's constitution. It makes provision for three governing units which have nation-wide jurisdiction. The ultimate authority is vested in the National Convention, which meets triennially and is composed of the elected delegates from various ships and ports. When the National Convention is not in session, the Union is governed by the National Council, which holds regular annual meetings and consists of the elected national officials and certain other delegated representatives. When the National Council is not in session, governing authority rests in the National Office, made up of the national presidents, secretary-treasurer, three vice presidents, and three national

representatives. This body is primarily responsible for the day to day, internal administration of NMU affairs.

In 1951 the NMU constitution was amended to permit the National Council, subject to membership approval, to provide pension benefits for all NMU officers and employees.[1] On December 29, 1952, pursuant to this authority, the National Council entered into an Agreement and Declaration of Trust with three trustees which gave them the authority to establish a pension plan. On February 16, 1953, the trustees adopted a plan whereby pension rights accrued to the various elected officials of the Union, including the president, secretary, treasurer, vice-president, national port committee member, branch agent, field patrolman, and patrolman. No non-elected employee of the Union was included under its coverage. The majority of the administrative employees of the NMU were represented by this or other unions in their employment relationship with the NMU and had been granted pension rights, as per-

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[1] The pertinent provisions of the 1951 NMU constitution read as follows:

"ARTICLE 15 SALARIES OF OFFICERS

SECTION 1—SALARIES AND EXPENSES: The National Council, considering the financial state of the Union, is empowered, subject to approval of the membership, to set from time to time the actual salaries and daily expenses of all Union officers and employees.

The National Council shall pay all salaries, approved by the membership, of all Union officers and employees. . . .

* * *

SEC. 8—PENSION AND WELFARE: The National Council, subject to approval of the membership is empowered to make adequate and appropriate provisions for pensions, welfare, and similar benefits for officers and employees of the Union."

Between the 1951 amendment to the constitution and 1960 pension plans were adopted for the employees pursuant to collective bargaining agreements.

mitted by the 1961 NMU constitution, as part of their respective collective bargaining agreements.[1a]

On October 28, 1961, the National Office (as opposed to the National Council) authorized an amendment to the Agreement and Declaration of Trust, the effect of which was to extend its coverage to certain executive and supervisory employees of the Union who held appointive rather than elective positions, such as the assistant to the president, organizer, executive secretary, publicity director, editor of the Pilot (the union house organ), and supervisors over maintenance, bookkeeping, records and supplies.[2]

Prior to the adoption of the amended Declaration of Trust, however, the NMU constitution had been subjected

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[1a] The last sentence of Article 8(a) of the 1960 constitution which concerns technical, clerical and administrative personnel attached to or under the National Office, provides:

> "Whenever possible, such employees shall be members of the NMU or of appropriate AFL-CIO affiliates."

With nothing shown to the contrary, it may be assumed that all of the few non-elected employees, arbitrarily brought under the Officers' Pension Plan by the National Office, already had pension coverage under collective bargaining agreements applicable to them. It must be emphasized that the present case had nothing whatever to do with such pension coverage, nor do the plaintiff in any way challenge or seeks to disturb those pension rights of the administrative employees. Rather, in the present action, they are questioning only the awards to the special few non-elected employees who have been granted the lucrative "pension rights" under the Officers' Pension Plan. For example, one of these special employees, the defendant Perry, who incidentally already had coverage under the NMU Deep Sea Pension Plan, resigned as assistant to the president, January 16, 1969, and, as a specially created beneficiary received over $100,000 under the Officers' Pension and Plan alone.

[2] Three years later, in 1964, the Officers' Pension Plan was again extended to include additional administrative personnel not covered by collective bargaining agreements.

to an extensive revision whereby, along with other changes, the authority vested in the National Council to fix the salaries of certain employees was shifted to the National Office and the requirement for membership approval thereof was deleted.[3] This revision became effective on December 2, 1960.

The plaintiffs contend that the 1961 amendments to the Declaration of Trust, by the National Office, permitting benefits to be paid to non-elected employees under the Officers' Pension Plan were not authorized by and were in contravention of the NMU constitution, as amended in

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[3] The amendment applicable to this case reads, in pertinent part, as follows:

"ARTICLE 8 NATIONAL OFFICE

* * *

SEC. 11—EMPLOYEES OF THE UNION: (a) The National Office shall be responsible for and shall fix the salaries of all technical, clerical, and administrative personnel as may be required for the effective administrative of the Union's affairs. Wherever possible, such employees shall be members of the NMU or of appropriate AFL-CIO affiliates.

(b) Collective bargaining agreements affecting employees of the NMU shall be negotiated by the National Office or such officer or officers as it may designate; provided that no such agreements shall be made without specific approval by the National Office."

"ARTICLE.14 COMPENSATION OF OFFICERS

Section 1—Salaries: (a) The National Council shall fix the salaries for all officers of the Union, subject to approval as provided by this Constitution.

Sec. 7—Pensions: All officers shall be eligible for benefits under the NMU Officers' Pension Plan, subject to such rules and regulations as the Trustees of that Plan may establish.

Sec. 8—Welfare: All officers shall be eligible for benefits under the Officers' Welfare Plan. The National Council, subject to membership approval, is empowered to improve the benefits under said Plan."

1960. After Union officials refused to take any action, as requested, to obtain the return of funds paid into the Trust fund for the benefit of non-elected employees under the revised Plan, the plaintiffs filed a complaint in the district court seeking an accounting, a money judgment for any damages suffered by the Union or the Trust fund, and an injunction against further payments to non-elected employees.

On February 4, 1969, the district court (Bryan, *Judge*) granted leave, pursuant to 29 U. S. C. § 501(b), to commence this action. Defendants Curran, Wall and Perry moved to dismiss the complaint under Rule 12(b)(5), F. R. Civ. P., or in the alternative for summary judgment under Rule 56. The plaintiffs filed a cross-motion for summary judgment against all defendants. Oral argument was heard on both motions on March 26 (Bonsal, *Judge*), and on May 23 the defendants' motions were denied and plaintiffs' cross-motion was granted. 302 F. Supp. 32 (S. D. N. Y. 1969). The court held that the defendants should account for and repay pension funds accrued and paid to non-elected Union employees, that the defendant trustees should be enjoined from paying out of the Officers' Pension Plan fund further benefits to non-officers and the plaintiffs should recover costs and attorneys' fees.

Immediately following the district court decision, the National Council of the Union convened and proposed amendments to the constitution which gave the National Office of the NMU the authority, which the trial court had found it did not have under the 1960 amended constitution, to designate certain non-elected employees to be eligible for benefits under the Officers' Pension Plan as well as the authority "to validate retroactively all pensions heretofore paid under the plan." The approval of these amendments

was voted on June 24, 1969. The plaintiffs promptly moved to have the June 24th amendments declared invalid as exculpatory, and therefore void, under § 501(a)[4] and to enjoin any implementation of them. The relief sought was denied without prejudice on July 3, 1969. The defendants moved that the entire action be dismissed as moot on the ground that the new amendments removed any question of the power of the defendants to act as they did.

Meanwhile, on June 2, 1969, defendants Curran, Wall and Perry filed a motion for reargument of the May 23 decision. On June 6 the plaintiffs filed a motion to enjoin the defendants from being represented by counsel retained by the Union, to require defendants to pay their own counsel from funds not belonging to the Union, and to enjoin the implementation of the proposed amendments to the NMU constitution on the ground that they were exculpatory and therefore void under 29 U. S. C. § 501(a). On June 11 a motion for reargument was filed on behalf of defendants Segal and Karchmer. In separate orders entered on July 3, 1969, these motions were denied, except for the motion relating to representation of defendants by Union counsel, which was not ruled upon.

The defendants have appealed from the district court decision granting summary judgment to the plaintiffs, denying their own similar motion and their motions for reargument. The plaintiffs have filed an interlocutory appeal from the trial court's denial of their motion to declare

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[4] The pertinent language of the statute provides:

". . . . A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy."

invalid and enjoin the use of the June 24 amendments to the NMU constitution. The major dispute on these appeals concerns the proper interpretation of the provisions for establishing employee pension funds under the 1951 NMU constitution, as amended in 1960.

Defendants argue that the 1960 amendments were designed to shift the responsibility for the establishment of employee salaries from the National Council to the National Office and did not limit in any way the power of the National Office to establish employee pension funds. They assert that the terms "salaries," as used in Article 8, § 11 must be construed to include pensions, from which they claim it follows that the National Office was acting within its authority when it amended the Officer's Pension Plan in 1961. In support of this position they rely upon such cases as *Brumley* v. *Baxter,* 225 N. C. 691, 36 S. E. 2d 281 (1945), and *Giannettino* v. *McGoldrick,* 295 N. Y. 208, 66 N. E. 2d 57 (1946), which hold that pensions are compensation for past services as opposed to gratuities, and in that sense, are included within the term "salary." But as the district court pointed out in its opinion, the framers of the NMU constitution, when drafting the 1960 revision, clearly had in mind a distinction between salaries and pensions, as evidenced by the use of the term "compensation" in Article 14 to include both types of remuneration. The NMU constitution, as amended in 1960, was clear and explicit with regard to the persons covered by the pension provisions, and in the light of the history, context and wording of those provisions, the district court's rejection of the defendant's claim is correct. There was no genuine issue of material fact concerning the charge of a breach of duty on the part of the defendants, and summary judgment in favor of the plaintiffs should be affirmed.

Appendix A.

In support of their claim that the 1969 amendments[5] to the NMU constitution, made immediately following the district court decision, are exculpatory and that their application should be enjoined, the plaintiffs rely on *Highway Truck Drivers and Helpers Local 107* v. *Cohen*, 182 F.Supp. 608 (E. D. Pa.), *aff'd.* 284 F. 2d 162 (3 Cir. 1960), *cert. denied*, 365 U. S. 833 (1961), and *Highway Truck Drivers and Helpers Local 107* v. *Cohen*, 215 F. Supp. 938 (E.D. Pa. 1963), *aff'd*, 334 F. 2d 378 (3 Cir.), *cert. denied*, 379 U. S. 921 (1964). In the first of these two cases the district court found that it was improper for the local union to pay the attorney fees of union officers who were under criminal indictment. These fees were to be paid pursuant to a resolution of the local which permitted such payment, and that resolution was declared invalid because it authorized "action beyond the powers of the union as derived from its constitution and was inconsistent with the aims and purposes of the Labor-Management Reporting and Disclosure Act." 284 F. 2d at 164. The international union then amended its constitution to permit such authorizations. Thereafter in the second *Cohen* case the union officers claimed that the payments were valid as the amendment purported to be retroactive. In rejecting this claim the Third Circuit said:

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[5] The following is the full text of those amendments:

"Amend Article 8, Section 11 to add the following paragraph: The National Office shall have the authority to provide pensions for all past and present employees of the Union and to protect the pension rights of all past and present employees of the Union.

Amend Article 14, Section 7, as follows:

Sec. 7—Pensions: All officers and such employees as the National Office may designate, shall be eligible for benefits under the NMU Officers' Pension Plan, subject to such rules and regulations as the Trustees of that Plan may establish. The National Office shall have the authority to validate retroactively all pensions heretofore paid under the Plan."

"That abortive attempt to validate the illegal 1959 resolution, could not of course in 1961 legitimatize the 1959 payments which have been held to have been wrongful. And the action of the International was just as inconsistent with Section 501 of the Labor Management Act as was the Local's ill conceived resolution." 334 F. 2d at 381.

The defendants in the present case, however, assert that the cases cited actually support the defense. It is their contention that the trial court held in the 1960 *Cohen* case that a resolution authorizing an expenditure of union funds was not an exculpatory provision in violation of § 501(a) and, in the 1963 *Cohen* case, that a constitutional amendment authorizing expenditures already incurred was not exculpatory unless the expenditures themselves were in violation of § 501 of the Act. Turning to the present case they argue that the court below did not find that the payments into the Officers' Pension Plan for the benefit of employees were per se violative of § 501(a), and therefore any subsequent constitutional provision purporting to validate the past payments cannot be exculpatory within the meaning of § 501(a). In making this assertion, the defendants conveniently overlook the fact that the trial court did find that they had breached their duties because the expenditures in question were not authorized by the NMU constitution and that they were in violation of § 501 of the Act. In the *Cohen* cases the trial court was affirmed because the local union authorized actions beyond its powers as derived from the constitution and because its effort to pay attorneys' fees for officers who had been derelict in their duties was "inconsistent with the aims and purposes of the Labor Management Reporting and Disclosure Act." We agree with the position taken by the Third Circuit. Otherwise the provisions of § 501 would be

completely emasculated if, every time a court, at the behest of complaining members of a union, found that the officers had breached their duties, the officers could find sanctuary by putting through a constitutional amendment or by-law retroactively to legitimatize their former derelictions of duty.

The defendants also argue that the district court "has not imposed any personal liability upon the defendants from which they needed to be 'exculpated,' " but we do not agree with this argument. The district court ordered the defendants to account for all moneys paid into the Officers' Pension Plan and return to the NMU all moneys received by the trustees for the benefit of non-officers with interest. It follows that if they are unable to recoup that money, they may be held personally liable.

The trial court's decision, however, on the plaintiffs' motion for an injunction, that the purpose of the 1969 amendments to the NMU constitution was to include non-officer employees in the NMU officers' pension plan and that the amendments were, therefore, not exculpatory provisions prohibited by § 501, is at odds with its holding that there was an obvious breach of duty on the part of the defendants in causing union funds to be paid out to persons who were not entitled to them. His conclusions might have been correct if the provisions were prospective only in their application but the amendment to Article 14, § 7 provides in part: "the National Office shall have the authority to validate retroactively all pensions heretofore paid under the plan." This is clearly exculpatory in intent and language. The NMU exercised its authority under the 1969 amendments to attempt to validate retroactively all the pensions previously paid. The determination that the 1969 amendments were not exculpatory is reversed and will be reconsidered on remand.

The defendants raise a number of additional minor issues, several of which will be commented upon. They

have throughout pressed the defense of laches. But the matter of improper payments of union funds to persons not entitled to them is a continuing offense and cannot bar an injunction to prevent continued payments or an accounting for all of the unlawful expenditures.

The defendants Segal and Karchmer claim that the ultimate order issued by Judge Bonsal exceeded the court's jurisdiction because it is their contention that the court's jurisdiction is fixed by the order issued by Judge Bryan on plaintiffs' application for leave to bring suit on February 4, 1969. This is an incorrect interpretation of § 501(b). The purpose of requiring permission to bring an action is a safeguard to protect the union officers from vexatious suits and once given is not to be treated as a stricture on jurisdiction. *Horner* v. *Ferron*, 362 F. 2d 224, 228 (9 Cir.), *cert. den.* 385 U. S. 958 (1966). An issue was also raised that Judge Bonsal had no power to grant summary judgment on plaintiffs' motion because of inadequacy of notice to some of the defendants. The trial court, however, had power on its own motion to enter summary judgment against the party who was the original mover. 6 Moore, Federal Practice, ¶ 56.12 at 2241 (2d ed. 1966). While some of the defendants had only a brief opportunity to prepare for the argument on the plaintiffs' motion, there is nothing whatever to indicate that any party was at all prejudiced. *Stein* v. *Oshinsky*, 348 F. 2d 999, 1000-01 (2 Cir.), *cert. den.* 382 U. S. 957 (1965).

Defendants also argue that the trustees of the Officers' Pension Plan do not come within the definition of those having a fiduciary responsibility as set forth in 29 U. S. C. § 402(q). This court has specifically rejected this claim in *Tucker* v. *Shaw*, 378 F. 2d 304, 308 (2 Cir. 1967). The trial court was correct in finding that all of the defendants were in a position of trust and responsibility in relation to the monies charged to have been unlawfully expended and all

had a duty to see that it was restored to the Union treasury.

The remaining points raised by the defendants do not merit discussion.

We affirm denial of the defendants' motion for summary judgment and the entry of summary judgment in favor of the plaintiffs. As the June 24, 1969, amendments to the NMU constitution are clearly exculpatory as prohibited by § 501(a), we reverse the denial of plaintiffs' motion to have these amendments declared void, and remand to the district court for appropriate action declaring the amendments to be without effect and enjoining defendants from acting in reliance upon them. As the district court apparently did not pass on so much of plaintiffs' motion as requested that defendants be enjoined from retaining counsel paid or to be paid with Union funds, this question should also be determined on remand. The controlling cases on this point are *Tucker* v. *Shaw, supra,* and *Holdeman* v. *Sheldon,* 311 F. 2d 2 (2 Cir. 1962), in which we held that all that is necessary for enjoining of the defendants in a § 501 action is that the plaintiff make "a reasonable showing that he is likely to succeed." We also note that the district court maintains continuing jurisdiction to insure that the accounting and return of funds to the Union treasury proceeds as ordered, and, of course, it retains the power to issue the necessary orders to assure full compliance.

Affirmed in part, reversed in part, and remanded for further proceedings in compliance with this opinion.

DANAHER, *Senior Circuit Judge* (dissenting):

Although according great respect for the views of my colleagues and for those of the able District Judge, Honor-

able Dudley B. Bonsal, I nonetheless fear that error has occurred.

The National Maritime Union of America (hereinafter NMU) was founded in 1937. Some fourteen years later, the still-young Union adopted a Constitution which, so far as is here pertinent, provided that "considering the financial state of the Union," the Union's National Council[1] was empowered to make adequate and appropriate provisions for pensions, welfare and similar benefits for officers and employees of the Union. That power was never rescinded, I suggest, but was later transferred to the National Office.

Agreeably to such authorization, effective as of February, 1953, the NMU Officers' Pension Plan was adopted, then covering all elected officers of NMU. There has been no challenge here to the validity of that Plan.

NMU in the management of its properties, in the administration of its far-flung business and in furtherance of its purposes, utilized the services of a staff of lawyers, economists, pension administrators, staff experts in Washinton, doctors, and supervisory staffs of Union-owned real estate.[2] For their protection as well as to further its own interest in their retention in its service, NMU negotiated with various unions of which its employees were members for the establishment of pension and welfare plans. As an employer, NMU was bound to bargain respecting hours, wages and conditions of employment. Although clearly authorized to do so, NMU had not until the events here

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[1] The National Council was authorized to act between National Conventions. Another entity, known as the National Office, was accorded the same powers as those reposed in the National Council, to be exercised in the more frequent meetings of the National Office.

[2] Some inkling of the nation-wide scope of the operations of NMU may be gleaned from the carefully-detailed findings of District Judge Motley outlined in *Wirtz* v. *National Maritime Union of America*, 284 F. Supp. 47 (S. D. N. Y. 1968); affirmed by this Court 399 F. 2d 544 (1968).

at issue, set up a separate plan for a few of its supervisory personnel, not elected officers and not represented by some union.

Some sixteen years after the original Plan had become effective, the plaintiffs here alleged that without authorization a lump-sum benefit[3] had been accorded to the defendant Perry following his resignation as Executive Assistant to the National President. Purporting to base the action upon 25 U. S. C. § 501, the plaintiffs had sought an accounting, a money judgment against the defendants, and an injunction to restrain the Trustees from paying benefits to Perry or any other non-elected employees of NMU. The Union was not made a party. Under date of May 23, 1969, the District Judge filed an Opinion holding, compendiously, that there was no authority[4] for covering non-employees into the Plan, and so he granted summary judgment for the plaintiffs. He ordered the defendants to account; enjoined the Trustees from paying benefits under the Plan to non-officers; and further directed the Trustees to return to NMU, with interest, all moneys received by the Trustees for the benefit of non-officers.

I.

Meanwhile, Congress adopted the "Welfare and Pension Plans Disclosure Act," effective as of January 1, 1959,[5] which defined an "employee pension benefit plan" to mean

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[3] The original Plan had specifically provided that the Trustees in their discretion might make a lump-sum payment in lieu of benefits otherwise provided. Indeed, the authorization was amended and extended in 1958.

[4] There was no evidence that the officer defendants or the Trustees personally benefited in any way or otherwise acted unlawfully, or that they had exercised bad faith. Cf. *Bakery and Confectionery Workers Internat'l U.* v. *Ratner*, 335 F. 2d 691 (1964).

[5] 29 U. S. C. A. § 301 et seq. PL 85-836, as amended by PL 87-420, 76 Stat. 35, which vastly increased the authority of the Secretary of Labor to supervise and to administer the disclosure requirements of the earlier Act.

> "any plan, fund or program which is communicated or its benefits described in writing to the employees, and which was heretofore or is hereafter established by an employer or by an employee organization, or by both, for the purpose of providing for its participants . . . retirement benefits . . . ."

And the Act further defined the term "participant" to mean

> "any employee or former employee of an employer or any member of an employee organization who is or may become eligible to receive a benefit of any type from an employee welfare or pension benefit plan . . . ."

NMU became bound to submit annually to the Secretary of Labor a report describing the Plan, an annual financial statement, and further information in such form and detail as the Secretary might prescribe. NMU complied with those requirements.[6]

So it was in part, and with the Labor Management Reporting and Disclosure Act of 1959 (LMRDA)[7] by this time on the statute books, the 1951 Constitution was revised at an NMU Convention held in October, 1960, with ratification by the membership after a referendum vote concluded in December of 1960.

I deem it unthinkable that the NMU membership supposed for a moment that the amended Constitution was intended to wipe out whatever rights to coverage had been acquired since 1952. There was no repealer clause in the 1960 revision. To me, it is inconceivable that the eligibility established in 1952, followed by good faith reliance under

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[6] 29 U. S. C. A. 32 §§ 304-307. NMU furthermore was bound to report in detail to the Bureau of Internal Revenue and annually did so.

[7] 29 U. S. C. A. § 401 et seq.

the express terms of the earlier Constitution, was to be deemed obliterated. I reject the suggestion that the Constitution, as revised, had narrowed the authority of this Union to provide pensions for any of its 47,000 members, whether they be elected officers or employees or whatever their status.

On the contrary the 1960 Constitution even broadened benefits to be accorded to members whose rights had previously accrued, as for example where Article 15, Section 8(f), specified that members

> "receiving a monthly pension under the NMU Welfare and Pension Plan or the NMU Officers' Pension Plan shall not be required to pay dues and shall be regarded as honorary members . . . ."

Against such background, lacking representation by any employee union and not possessing the status of elected officers, a few non-elected employees were brought into the Plan. Perry as Assistant to the President[8] was included, certain others being identified as Organizer, Maintenance Supervisor, Bookkeeper Supervisor, Records and Supply Supervisors, Executive Secretary, Publicity Director and the Editor of the NMU official News Organ, The Pilot.

In sum, my reading of the record and my construction of the NMU Constitution convince me, first, that it had always been the plain intendment of this Union that pensions for both officers and employees be authorized; and next, that the power to establish any plans had been created in 1951, with continuing authorization to amend whatever

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[8] The Constitution in Article 13, Section 1, provided as to the National President that:

> (f) He may, in his discretion, and at such salary as the National Office may determine, appoint a member, or members, of the Union to assist him in the exercise of his administrative functions; provided that such assistant or assistant shall at no time act in an executive capacity.

plan might thereupon be established. See, for example, Article 15, Section 8 of the Constitution, ratified in 1951, which read:

> The National Council, subject to approval of the membership, is empowered to make adequate and appropriate provisions for pensions, welfare, and similar benefits for officers and employees of the Union.

Nothing to be discerned from the revised Constitution, ratified December 2, 1960, detracted one whit from that authority. Rather, I suggest, the later revision must be read with the former. The only difference in giving effect to the continuing intent of the Union membership was that after the 1960 revision, the authority to act was transferred from the National Council to the National Office. I conclude that even without more than my analysis suggests, the District Judge erred in concluding that at the time the challenged action was taken, there had been a lack of authority to provide pensions for all past and present employees of the Union.

II.

But there was more. After the release of Judge Bonsal's May 23, 1969 Opinion, the Union promptly took steps to reiterate the NMU intention. If the judge could be heard to say the NMU had failed to make clear its intention, two amendments to the Constitution were immediately proposed. The amendments by referendum were forthwith approved by the membership by an overwhelming vote. Accordingly, the revised 1960 Constitution was further amended by the addition to Article 8, Section 11, of the following:

> (d)—The National Office shall have the authority to provide pensions for all past and present employees

of the Union and to protect the pension rights of all past and present employees of the Union.

The membership further amended Article 14, Section 7, to read as follows:

> Pensions: All officers and such employees as the National Office may designate shall be eligible for benefits under the NMU Officers' Pension Plan, subject to such rules and regulations as the Trustees of that Plan may establish. The National Office shall have the authority to validate retroactively all pensions heretofore paid under the Plan.

These plaintiffs then attacked the amendments as "exculpatory" within the meaning of 29 U.S.C. § 501, and they sought an injunction. The District Judge flatly—and correctly—rejected that contention and ruled that the amendments "were not exculpatory provisions prohibited by 29 U. S. C. § 501. *Their purpose is obviously to include non-officer employees in the NMU Officers' Plan.*"[9] (Emphasis added.)

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[9] DECISION AND ORDER ON MOTION FOR AN INJUNCTION

The amendments to the NMU Constitution are not exculpatory provisions prohibited by 29 U. S. C. 501. Their purpose is obviously to include non-officer employees in the NMU Officers' Pension Plan. According to the Certification of the Honest Ballot Association, dated June 24, 1969, the following amendments were adopted by a vote of 10,043 to 1,685:

"Add the following paragraph to Article 8, Section 11:

(d)—The National Office shall have the authority to provide pensions for all past and present employees of the Union and to protect the pension rights of all past and present employees of the Union.

"Amend Article 14, Section 7 to read as follows:

Pensions: All officers and such employees as the National Office may designate shall be eligible for benefits under the NMU Officers' Pension Plan, subject to such rules and regulations as the Trustees of that Plan may establish. The

Granting that the Constitution had validly been amended, the District Judge's July 3, 1969 Memorandum observed, "It does not appear that the National Office has exercised this authority."

I read him to be saying, "I do not perceive that the necessary authority existed to include non-officers at the time they were covered into the Plan. But now NMU has conferred that authority. Even so as of this moment, the National Office has not so far exercised its power." And accordingly he concluded *only* that since the inclusion of non-officers "was beyond the power of the defendants, plaintiffs are entitled to appropriate relief."[10]

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9 (con'd)

National Office shall have the authority to validate retroactively all pensions heretofore paid under the Plan."

While it is stated that 12,040 members obtained a ballot, it is not stated how many members of NMU were eligible to vote. The amendment to Article 14, Section 7 provides that "the National Office shall have the authority to validate retroactively all pensions heretofore paid under the Plan." However, it does not appear that the National Office has exercised this authority.

Plaintiffs' motion is denied, without prejudice to the plaintiffs seeking further relief by appropriate application if the defendants should violate the order of the court.

It is so ordered.

Dated: New York, N. Y.
July 13, 1969.

DUDLEY B. BONSAL
U. S. D. J.

[10] DECISION AND ORDER ON MOTION FOR REARGUMENT

Defendants' motion for reargument is denied. The interpretation of the meaning of "salaries" sought by defendants would not change the holding that only officers were eligible for benefits under the NMU Officers' Pension Plan, for the reasons stated in the Memorandum filed May 23, 1969. Therefore the inclusion of non-officers in the Plan was not authorized by the NMU Constitution as revised in 1960. Since such inclusion was beyond the power of the defendants, plaintiffs are entitled to appropriate relief.

Consideration has been given to the affidavit of the defendant Martin Segal dated June 11, 1969, which was filed in support of the defendants' motion for reargument. Mr. Segal is one of the trustees of the NMU Officers' Pension Plan, who appeared in the action and

Thereupon after such prompting, as the record shows, the National Office acted to implement the authority so recently reaffirmed. It adopted a resolution based upon the desire of the National Office "to confirm the pension rights of all employees of the Union, both retroactively and prospectively." The text appears in the margin.[11]

Right then and there, having been advised in the premises, the assumed omission having been cured by NMU, the

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(10 cont'd)

filed his answer on May 1, 1969. The court does not question Mr. Segal's good faith as trustee. However, the plaintiffs are entitled to obtain the return to NMU of the monies paid to the Fund on behalf of non-officers since their inclusion was not authorized.

It is so ordered.

Dated: New York, N. Y.
July 3, 1969.

DUDLEY B. BONSAL
U. S. D. J.

[11] "NOW, THEREFORE be it Resolved:

(1) All pensions, heretofore paid by the NMU Officers' Pension Plan are hereby validated and approved.

(2) All employees of the Union except (a) those already covered by collective bargaining agreements where the NMU is the employer, which collective bargaining agreements provide for the covered employees . . . shall be eligible for benefits under the NMU Officers' Pension Plan.

(3) Payments on the NMU Officers' Pension Plan to provide for the foregoing benefits are hereby authorized and all past payments by the Union to the NMU Officers' Pension Plan are hereby ratified and approved."

Pursuant thereto, the Plan (identified as that which was "effective as of February 16, 1953," as amended) was again amended in Article I, Section 8 to define, more specifically, the term "Participant" to mean

"an Officer, Representative, Supervisor or Professional, and all other employees of the Union except (a) any employee whose compensation, hours of work or conditions of employment are determined by collective bargaining with a recognized bargaining agent . . . ."

And Section 9 defines "NMU Constitution" to mean

"the Constitution of the NMU in force and effect at the time of the adoption of this Pension Plan [1953] together with any amendments thereto."

Appendix A.

District Judge should have entered summary judgment in behalf of the *defendants*, thus rendering moot whatever claims had previously been urged upon the Court by these plaintiffs. To take any other view, as it seems to me, is not only to deny NMU its right to manage its own affairs.[12] but in view of the rectification of whatever oversight the Judge thought he had detected, the membership clearly restated its approval of the authority of the National Office and of the Trustees to provide pensions for all officers and all employees.[13]

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[12] The Supreme Court has recognized that unions in the view of Congress are to be accorded great latitude in resolving their own internal controversies. *Wirtz* v. *Bottle Blowers Assn.*, 389 U. S. 463, 471, text, n. 10 (1968); cf. *Wirtz* v. *Hotel Employees*, 391 U. S. 492, 497 (1968).

[13] Applying to the documents before us principles analogous to those governing statutory construction, we are bound to read them together. Certainly repeals by implication are not favored, and nowhere can it be seen that the 1960 Constitution repealed the earlier version. Where there are two acts upon the same subject, it is fundamental that the rule is to give effect to both if possible. *United States* v. *Borden*, 308 U. S. 188, 198 (1939).

The language before us must be interpreted in the light of reason and understanding to reach the results intended by the NMU's Conventions and the respective Constitutions which reflect the membership approval. *Rathbun* v. *United States*, 355 U. S. 107, 109 (1957); cf. *United States* v. *Public Utilities Comm'n*, 345 U. S. 295, 315 (1953).

If caution "against a literal reading of congressional legislation" be required, *Wirtz* v. *Bottle Blowers Assn.*, *supra*, at 468, how much more so should that caution be applied to the language, often enough inartful, as employed by the Union's draftsmen. Recognition of the *general objectives* sought to be achieved by NMU should provide the key to a reconciliation of all alleged doubts.

This was no case where officers of the Union were misappropriating Union funds for themselves. Cf. *Tucker* v. *Shaw*, 378 F. 2d 304, 306 (2 Cir. 1967); indeed, the Judge found no lack of good faith on the part of the trustees, cf. *Coleman* v. *Brotherhood of Railway & Steamship Clerks, Etc.*, 340 F. 2d 206, 209 (2 Cir. 1965). Here, the Union officers, the National Office, the NMU membership and the trustees had undertaken, to do precisely what the Union sought to accomplish.

The purpose and the intent of the Union emerged conclusively. I respectfully submit, and the conferred authority was exercised.

III.

Having in mind that the District Judge concluded that summary judgment was in order, perhaps it will not be amiss to turn back to his May 23, 1969 Memorandum Decision. There he concluded that the "plaintiffs' action for breach of defendants' fiduciary duties is not barred by laches." He continued that "in this case defendants have made no showing that they have been prejudiced by the delay."

Judge Motley found in *Wirtz* v. *National Maritime Union of America,* 284 F. Supp. 47, 53 (1968), that the defendant Wall in the 1966 contest for National Secretary-Treasurer had defeated the plaintiff Morrissey by a vote on the order of two to one. The plaintiff Padilla received the least number of votes and by about the same ratio as he sought election as one of the Vice-Presidents. These plaintiffs then had filed protests *id.*, 57, in accordance with the provision of the Constitution, and after their protests had been heard and rejected they sought the intervention of the Secretary of Labor. They did not do so here, and it may be noticed that the Secretary is not complaining concerning the present issue,[14] although he had been kept informed through the annual filing of the reports required by the Disclosure Acts.

discussing, we find these plaintiffs seeking an accounting

Now, some eight years after the actions we have been and a return of moneys contributed to the Pension Plan. If

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[14] In passing it should be noted that the Internal Revenue Service had required NMU to amend the Plan so as to cover broadly *all* employees, officers, as well as non-officers. Thereupon, the Plan, so amended, was approved by the Bureau of Internal Revenue.

as the plaintiffs contend on brief these defendants under the judgment will be bound individually to return to NMU all moneys theretofore paid or accrued for the benefit of the intended participants, it is difficult to see why the defendants shall not "have been prejudiced by the delay." Surely if this action had earlier been commenced and concluded with like result, it would seem inevitable that liability so entailed would have been limited. Moreover, corrective action, if really required, could at once have been taken to the end that the Union's concern for eligible participants be satisfied.

It seems to me that a hearing, at least on this aspect of the case, was clearly in order. I fail to see how the Judge could have faulted the defendants as having "made no showing that they have been prejudiced by the delay." To what extent that conclusion of the District Judge entered into his determination that summary judgment was in order, we do not know. But we do know that despite the absence of extrinsic evidence both on this point and with respect to what was in fact the intention of the Union, summary judgment for the plaintiffs was directed.[15] If summary judgment were not to be entered in favor of the *defendants* for the reasons previously advanced, at the very least according to my appraisal of the record here there should have been a hearing. There was error on account of that failure if for no other reason.

IV.

It would unduly protract this exposition of my views were I to go into further detail. Sounding again the note on which I opened, I respectfully submit my observations with the greatest regard for those of my colleagues and Judge Bonsal.

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[15] Cf. *United States* v. *Diebold, Inc.*, 369 U. S. 654, 655 (1962).

APPENDIX B

Memorandum Decision of District Court, dated May 23, 1969.

MEMORANDUM

BONSAL, *D. J.*

Plaintiffs are three members of the National Maritime Union of America (NMU); defendants Curran and Wall are elected officers of the NMU; defendant Perry was an employee of the NMU and Assistant to the President; and defendants Segal, Freedman, and Karchmer are trustees of the NMU Officers' Pension Plan (the Pension Plan).

Plaintiffs instituted this action in February 1969. The complaint alleges that defendants allowed the Pension Plan to be amended in 1961, so as to include as participants designated employees of the NMU, who were not elected officers of the NMU (non-officers), in violation of the NMU Constitution then in effect; and that the amendment was designed to siphon NMU funds to the non-officers who were not authorized to receive them. Plaintiffs seek an accounting and money damages from the defendants responsible; an injunction enjoining the Trustees from paying any benefits to non-officers; and costs, disbursements, and attorneys' fees, under 29 U.S.C. § 501(b).

Defendants Curran, Wall, and Perry (moving defendants) move for an order, pursuant to Rule 12, F. R. Civ. P., dismissing the action; or, in the alternative, for an order, pursuant to Rule 56, F. R. Civ. P., for summary judgment on their behalf. Plaintiffs cross-move for summary judgment as against all defendants.

In 1951, following the amendment of the NMU Constitution, Article 15, entitled "Salaries of Officers," pro-

vided, in part, as follows:

> *"Section 1—Salaries and Expenses:* The National Council . . . is empowered, subject to approval of the membership, to set from time to time *the actual salaries* and daily expenses *of all Union officers and employees.*
>
> • • •
>
> *Sec. 8—Pension and Welfare:* The National Council, subject to approval of the membership is empowered to make adequate and appropriate provisions for *pensions,* welfare, and similar benefits *for officers and employees of the Union."* (Emphasis added.)

On December 29, 1952, an Agreement and Declaration of Trust (the Trust Agreement) was entered into between the NMU and three Trustees, including defendants Segal and Karchmer, granting to the Trustees authority to establish the Pension Plan.

On February 16, 1953, the Trustees promulgated the Pension Plan, which provided that "officers" who had attained a certain age and had credit for a certain number of years of "covered employment" were eligible to receive pension benefits.*

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* Relevant provisions of the Pension Plan were as follows:

"ARTICLE II. DEFINITIONS

Section 5. *'Officers'* shall mean a person holding any one of of the following offices in accordance with the provisions of the NMU constitution:

(a) National President
(b) National Secretary
(c) National Treasurer
(d) Vice President
(e) National Port Committee Member
(f) Branch Agent
(g) Field Patrolman
(h) Patrolman

• • •

Section 7. *'Covered Employment'* shall mean employment as an officer of the NMU."

Memorandum Decision of District Court, dated May 23, 1969.

In 1960, the NMU Constitution was again substantially revised and a new Article 14, entitled "Compensation of Officers," was substituted for Article 15 of the 1951 Constitution.

Article 14 provided, in relevant part:

> "*Section 1—Salaries:* (a) The National Council shall fix the *salaries for all officers of the Union,* subject to approval as provided by this Constitution.
>
> • • •
>
> *Sec. 7—Pensions: All officers shall be eligible for benefits under the NMU Officers' Pension Plan,* subject to such rules and regulations as the Trustees of the Plan may establish." (Emphasis added.)

Article 8, entitled "National Office," was also amended in 1960 to provide that the National Office was "responsible for and shall fix the salaries" of staff personnel of the NMU, including the non-officers, and shall negotiate collective bargaining agreements for the employees of the NMU.

On October 28, 1961, the Trust Agreement of 1952 was amended so as to make eligible for pension benefits non-officers holding the following positions, and the Pension Plan was amended accordingly:

Assistant to the President

Organizer

Maintenance Supervisor

Bookkeeping Supervisor

Records and Supplies Supervisor

Executive Secretary

Publicity Director

Editor of "The Pilot"

Memorandum Decision of District Court, dated May 23, 1969.

Plaintiffs contend that the defendants violated the 1960 Constitution by allowing non-officers to be included in the Pension Plan. On the other hand, the moving defendants assert that they were acting under their power in Article 8 to fix salaries and bargain collectively for NMU employees; and that this power included the right to provide pension benefits under the Pension Plan for non-officers.

Article 15 of the 1951 Constitution empowered the National Council "to make . . . provisions for pensions . . . for officers and employees of the Union." Article 14 of the 1960 Constitution deleted the word "employees," stating that "All officers shall be eligible for benefits under the [Pension Plan]." Thus, the 1960 Constitution did not continue the authority to include non-officers in the Pension Plan.**

While the term "salaries" may include "pensions," as delayed payments of salary, *Brumley* v. *Baxter*, 225 N. C. 691, 36 S. E. 2d 281 (1945), see *Inland Steel Co.* v. *N. L. R. B.*, 170 F. 2d 247 (7th Cir. 1948), *cert. denied*, 336 U. S. 960 (1949), the 1960 Constitution carefully distinguished between the two, using the term "compensation" in the title of Article 14 to encompass "salaries" in section 1 and "pensions" in section 7. In the previous Constitution, the word "salaries" was used in Article 15 to cover both. Moreover, a reading of Article 14 of the 1960 Constitution makes a clear distinction between officers and employees. Thus, section 5, with reference to illness, speaks of "an officer or employee," and section 6, relating to severance pay, again speaks of "an officer or employee," while section 7, dealing with pensions, speaks of "all officers."

Since the 1960 Constitution did not authorize the inclusion of the non-officers in the Pension Plan and it is

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** The authority to provide pensions for employees in the 1951 Constitution was not exercised by the NMU. The Pension Plan between 1951 and 1960 included officers only.

not denied that funds of the NMU have been paid to the Trustees for disbursal to the non-officers under the Pension Plan, plaintiffs are entitled to relief under 29 U. S. C. § 501.

Plaintiffs argue that they are entitled to summary judgment since the only issue in the case, the construction of the 1960 Constitution, has been resolved in their favor. On the other hand, moving defendants say that there are contested issues as to which of the individual defendants were responsible for the amendment including non-officers in the Pension Plan; whether adoption of the amendment was a breach of fiduciary duty; and whether plaintiffs' action is barred by laches. In addition, defendant Karchmer asserts that he was not timely served by plaintiffs with their cross-motion for summary judgment and that he is not a proper party defendant under 29 U. S. C. § 501.

There is no genuine issue of fact as to the responsibility of the defendants. It is admitted that defendant Curran, as President of the NMU, and defendants Karchmer, Segal, and Freedman, as Trustees of the Pension Fund, were responsible for authorizing the amendment including the non-officers in the Pension Plan. Defendant Wall, as Secretary-Treasurer, is responsible for the financial affairs of the NMU, and under the 1960 Constitution he and Curran are "directed to pay all obligations incurred by or on behalf of the Union," including payments to the Pension Plan. Defendant Perry, formerly Assistant to the President, was a non-officer who by the amendment was made eligible to receive pension benefits under the Pension Plan.

Under 29 U. S. C. § 501, defendants Curran, Wall, and Perry owe a fiduciary duty to the NMU and its members

> "to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution . . . and . . . to refrain . . . from holding or

> acquiring any pecuniary . . . interest which conflicts with the interests of such organization . . ."

Defendants Karchmer, Segal, and Freedman owe the same fiduciary duty to the NMU and its members as Trustees of the officers' Pension Plan.

Plaintiffs' action for breach of defendants' fiduciary duties is not barred by laches. The amendment, including the non-officers in the Pension Plan was adopted in 1961, and less than seven years later plaintiffs requested the NMU for an accounting and for a return of moneys contributed to the Pension Plan. In an action based on breach of fiduciary duties, the defense of laches is carefully scrutinized, *Libby* v. *L. J. Corporation,* 247 F. 2d 78, 82 (D. C. Cir. 1957), and in this case defendants have made no showing that they have been prejudiced by the delay.

Although it appears that plaintiffs did not timely serve their cross-motion for summary judgment, see Rule 56(c), F. R. Civ. P., the court will consider the cross-motion, inasmuch as it could enter judgment for plaintiffs on its own motion, *Bell* v. *Waterfront Commissioner of N. Y. Harbor,* 183 F. Supp. 175 (S. D. N. Y. 1960), *aff'd,* 279 F. 2d 853 (2d Cir. 1960). See also *Williams* v. *Howard Johnson's Inc. of Washington,* 323 F.2d 102, 104 (D.C. Cir. 1965); 6 Moore, *Federal Practice,* ¶ 56.15[6] (2d ed. 1966).

Accordingly, defendant's motion to dismiss plaintiffs' action or, in the alternative, for summary judgment, is denied. Plaintiffs' motion for summary judgment is granted, and judgment will be entered in favor of plaintiffs, directing defendants to account; enjoining defendant Trustees from paying any benefits under the Pension Plan to non-officers; and directing the Trustees to return to the NMU all moneys received by the Trustees for the benefit of non-officers, with interest from the dates the moneys were received. Plaintiffs are entitled to costs, disbursements

and attorneys' fees out of the amounts returned by the Trustees to the NMU, in such amounts as may be approved by the court.

Settle order on notice.

Dated: New York, N. Y., May 23, 1969.

DUDLEY B. BONSAL
U.S.D.J.

APPENDIX C

Decision and Order of District Court Denying Reargument (July 3, 1969).

Defendants' motion for reargument is denied. The interpretation of the meaning of "salaries" sought by defendants would not change the holding that only officers were eligible for benefits under the NMU Officers' Pension Plan, for the reasons stated in the Memorandum filed May 23, 1969. Therefore the inclusion of non-officers in the Plan was not authorized by the NMU Constitution as revised in 1960. Since such inclusion was beyond the power of the defendants, plaintiffs are entitled to appropriate relief.

Consideration has been given to the affidavit of the defendant Martin Segal dated June 11, 1969, which was filed in support of the defendants' motion for reargument. Mr. Segal is one of the trustees of the NMU Officers' Pension Plan, who appeared in the action and filed his answer on May 1, 1969. The court does not question Mr. Segal's good faith as trustee. However, the plaintiffs are entitled to obtain the return to NMU of the monies paid to the Fund on behalf of non-officers since their inclusion was not authorized.

It is so ordered.

Dated: New York, N. Y., July 3, 1969.

DUDLEY B. BONSAL
U.S.D.J.

APPENDIX D

Decision and Order of District Court Denying Injunction (July 3, 1969).

The amendments to the NMU Constitution are not exculpatory provisions prohibited by 29 U. S. C. 501. Their purpose is obviously to include non-officer employees in the NMU Officers' Pension Plan. According to the Certification of the Honest Ballot Association, dated June 24, 1969, the following amendments were adopted by a vote of 10,043 to 1,685:

> "Add the following paragraph to Article 8, Section 11:
>
> (d)—The National Office shall have the authority to provide pensions for all past and present employees of the Union and to protect the pension rights of all past and present employees of the Union.
>
> "Amend Article 14, Section 7 to read as follows:
>
> Pensions: All officers and such employees as the National Office may designate shall be eligible for benefits under the NMU Officers' Pension Plan, subject to such rules and regulations as the Trustees of that Plan may establish. The National Office shall have the authority to validate retroactively all pensions heretofore paid under the Plan."

While it is stated that 12,040 members obtained a ballot, it is not stated how many members of NMU were eligible to vote. The amendment to Article 14, Section 7 provides that "the National Office shall have the authority to validate retroactively all pensions heretofore paid under the Plan." However, it does not appear that the National Office has exercised this authority.

Plaintiffs' motion is denied, without prejudice to the plaintiffs seeking further relief by appropriate application if the defendants should violate the order of the court.

It is so ordered.

Dated: New Nork, N. Y.
July 3, 1969.

DUDLEY B. BONSAL
U. S. D. J.

APPENDIX E

District Court Opinion, November 15, 1972.

BONSAL, D. J.

In signing the judgment dated November 15, 1972, the court has allowed plaintiffs' attorneys, Messrs. Duer & Taylor, the sum of $111,864, of which $110,000 represents counsel fees and disbursements, and $1,864 represents accountants' fees and disbursements incurred by plaintiffs' attorneys in connection with this litigation. The amount so allowed is to be paid by NMU from the judgment recovered by the National Maritime Union ("NMU") against the NMU Officers Pension Plan ("the Officers Pension Plan") in the amount of $674,222.60, which judgment was dated February 18, 1972 and the amount of which judgment has been paid to NMU. This allowance is made pursuant to Section 501(b) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA").

In its application for attorneys' fees, disbursements and necessary expenses (Affidavits of February 9, February 14, July 11, and November 6, 1972), plaintiffs' attorneys seek a fee of $350,000 plus disbursements as of that date of $3,589.54, and as a necessary expense, the bill of the accounting firm of Greenstein & Greenstein in the amount of $3,724, of which $3,360 is for services and $364 is for disbursements. Objections have been filed on the ground that the plaintiffs' attorneys had unduly puffed up the value of their services and have not furnished a statement of the actual hours spent by them in the prosecution of the litigation. The affidavit filed by plaintiffs' attorneys on November 6, 1972 states:

> "I did not make a practice of entering the day by day time spent. However, I know that the hours spent by me and by my said partners averaged at least 15 hours per week. To be on the very conservative side I stated in my affidavits of July 11, 1972, and I repeat

that the time well exceeded 2,500 hours up to that date.

"Since then additional time was spent at the hearing in Court of July 12, 1972, and in reviewing the stenographic records, the preparation of plaintiffs' brief, the consideration of defendants' briefs, in the preparation of plaintiffs' reply briefs, the study of the Court's opinion, the preparation of judgment, and the papers submitted in opposition to proposed judgments submitted by defendants."

In considering the allowance to be made to plaintiffs' attorneys, the court recognizes that this was a hard-fought litigation brought by three-union members on behalf of NMU; that plaintiffs were successful in establishing that NMU's Officer Pension Plan violated NMU's constitution; that there were proceedings both in this court and in the Court of Appeals, with certiorari being denied by the Supreme Court; and that the plaintiffs have been successful in obtaining a recovery on behalf of NMU from the Officers Pension Plan in the amount of $674,222.60.[1] In determining a reasonable fee for plaintiffs' attorneys, the court has considered the following factors: (1) the amount of the recovery; (2) the novelty and complexity of the legal issues; (3) the manner in which the services were performed and the standing of plaintiffs' attorneys: (4) the benefit to NMU; (5) the contingent nature of plaintiffs' attorneys' employment; and (6) the time reasonably expended by plaintiffs' attorneys. See *Derdiarian* v. *Futterman Corp.*, 254 F.Supp. 617 (S.D.N.Y. 1966); *Fox* v.

[1] In addition, plaintiffs have obtainted a judgment in favor of the Officers Pension Plan against defendant William Perry in the amount of $222,000, plus interest, being the amount of the lump sum pension which was paid to Mr. Perry and to which he was not entitled.

Glickman Corp., 253 F.Supp. 1005 (S.D.N.Y. 1966); *Winkelman* v. *General Motors Corp.*, 48 F.Supp. 504 (S.D.N.Y. 1942), *aff'd sub nom., Singer* v. *General Motors Corp.*, 136 F.2d 905 (2d Cir. 1943); *Angoff* v. *Goldfine*, 270 F.2d 185 (1st Cir. 1959).

Plaintiffs obtained a substantial recovery on behalf of NMU, and it has been said that "the amount of recovery rather than the time spent is the prime factor in fixing [the] fee." *Derdiarian* v. *Futterman Corp., supra* at 620. The issues presented were not complicated and the proceedings themselves were quite simple. The issue of whether the inclusion of non-officers in NMU's Officers Pension Plan violated NMU's constitution was decided on a motion for summary judgment. A one-day trial was held on August 23, 1971 to determine the amount paid by NMU to the Officers Pension Plan for non-officers: the amount paid by the Officers Pension Plan to non-officers: and the liability of defendant Perry to the Officers Pension Plan. Thereafter, a trial was held on April 13, 14, May 1, and July 12, 1972, on the issue of whether certain officers of NMU and certain trustees of the Officers Pension Plan should be surcharged under LMRDA.

No information has been presented as to the expertise of plaintiffs' attorneys in this type of litigation, and their services, while showing imagination, were routine.

Plaintiffs' attorneys are unable to give the number of hours reasonably expended by them in this litigation. However, they indicate that their services extended over a period of 3½ years and estimate that they expended in excess of 2,500 hours to July, 1972.

Plaintiffs' attorneys' fees were contingent on recovery, and the provision for attorneys' fees in Section 501(b) is an important consideration in actions brought under LMRDA. Indeed, without the stimulus provided by Section 501(b) many deserving cases of violations of LMRDA

would not be prosecuted by objecting members of the union. In this respect, Section 501(b) is not unlike Section 16(b) of the Securities Exchange Act of 1934. In *Smolowe* v. *Delendo Corp.*, 136 F. 2d 231 (2d Cir.), *cert. denied*, 320 U.S. 751 (1943), the Court of Appeals stated at page 241: "Since in many cases such as this the possibility of recovering attorney's fees will provide the sole stimulus for the enforcement of § 16(b), the allowance must not be too niggardly."[2]

Plaintiffs' attorneys seek an allowance, as a necessary expense, the fee claimed by their accountants, Greenstein & Greenstein. Harry Greenstein, a partner of the accounting firm, filed an affidvait dated February 3, 1972, to which is attached their bill to plaintiffs' attorneys in the amount of $3,724, dated February 1, 1972, and a copy of their diary entries which state that they spent 96 hours in performing accounting work and in testifying at trial. The accountants claim compensation at the rate of $36 an hour, or $3,360 plus disbursements of $364, making a total of $3,724. The services of Greenstein & Greenstein related only to making an accounting to determine the amount paid by NMU to the Officers Pension Plan for the account of non-officers and the amounts paid by the Officers Pension Plan to non-officers. This was not difficult, involving only a limited study of the accounts of NMU and the Officers Pension Plan. In the court's opinion, the amount claimed is excessive. Plaintiffs' attorneys will be allowed $1,500 to cover the accountants' fees, and $364 to cover the accountants' disbursements.

Taking the foregoing factors into consideration, plaintiffs' attorneys have been awarded the sum of $110,000 for reasonable attorneys' fees, inclusive of disbursements,

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[2] See also *Ratner* v. *Bakery & Confectionery Workers Int. U.*, 254 F.2d (D.C.Cir. 1965), note 7 at page 306.

and $1,864 for the services and disbursements of Greenstein & Greenstein, making a total of $111,864 which shall be paid by NMU out of its recovery from the Officers Pension Plan, of $674,222.60.

It is so ordered.

Dated: New York, N. Y., November 15, 1972.

DUDLEY B. BONSAL
U.S.D.J.

APPENDIX F

29 U.S.C. § 481(a), Labor Management Reporting and Disclosure Act of 1959 Sec. 401(a).

§ 481. Terms of Office and Election Procedure—Officers of National or International Labor Organizations; Manner of Election.

(a) Every national or international labor organization, except a federation of national or international labor organizations, shall elect its officers not less often than once every five years either by secret ballot among the members in good standing or at a convention of delegates chosen by secret ballot.

APPENDIX G

29 U.S.C. § 501(a)(b), Labor-Management Reporting and Disclosure Act of 1959 Sec. 501(a)(b).

§ 501. FIDUCIARY RESPONSIBILITY OF OFFICERS OF LABOR ORGANIZATIONS—DUTIES OF OFFICERS; EXCULPATORY PROVISIONS AND RESOLUTIONS VOID.

(a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

Appendix G.

Violation of duties; action by member after refusal or failure by labor organization to commence proceedings, jurisdiction; leave of court; counsel fees and expenses.

(b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

APPENDIX H

Olick's Letter to Judge Hays of June 19, 1973 (Treated as Perry's Petition for Rehearing).

June 19, 1973

Hon. Paul R. Hays
United States Circuit Court Judge
United States Courthouse
Foley Square
New York, N.Y. 10007

Re: Morrissey v. Curran, et al.
Docket ## 72-2443, 73-1082, 73-1363, 73-1383

Dear Judge Hays:

The consolidated appeals in the above matter were argued before a panel consisting of yourself and Judges Smith and Timbers on April 11, 1973. A decision was rendered on June 18, 1973. One of the issues raised on the appeal relating specifically to William Perry was whether the District Court had jurisdiction to enter a personal judgment against him in the sum of $263,307.00 in favor of the Officers' Pension Plan. Mr. Perry appealed separately from this judgment and this office, on his behalf, submitted a brief and oral argument on this point. We find nothing in the Court's decision of June 18, 1973 which in any way disposes of Mr. Perry's separate appeal or even makes mention thereof.

Accordingly, clarification is respectfully requested with respect to the issues raised by Mr. Perry which are separate and distinct from issues raised by the other appellants.

Very truly yours,

ARTHUR S. OLICK
Arthur S. Olick

ASO:bk
BY HAND

APPENDIX I

Pesner's Letter to Judge Hays of June 25, 1973 Confirming Petition.

June 25, 1973

Honorable Paul R. Hays
United States Circuit Court Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: Morrissey v. Curran, et al.
Docket Nos. 72-2443, 73-1082, 73-1363, 73-1383

Dear Judge Hays:

This letter will confirm my telephone conversation with your law clerk, Thomas Galloway, of June 25, 1973 in which our office was informed that our letter to you dated June 19, 1973 will be considered by you as a petition for re-hearing on behalf of William Perry pursuant to Rule 40 of the Federal Rules of Appellate Procedure.

Copies of our June 19, 1973 letter and of this letter are being sent to all counsel for the respective parties in this matter.

Very truly yours,

KREINDLER, RELKIN, OLICK & GOLDBERG
STEVEN M. PESNER
Steven M. Penser

SMP:mia
cc: Arthur E. McInerney, Esq.
Joseph P. Altier, Esq.
Simon H. Rifkind, Esq.
Roy L. Reardon, Esq.
Herman E. Cooper, Esq.

APPENDIX J

Order Denying Plaintiffs-Appellants' Petition for Rehearing.

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventeenth day of July, one thousand nine hundred and seventy-three.

JAMES M. MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, individually and on behalf of the members of the NATIONAL MARITIME UNION OF AMERICA,

Plaintiffs-Appellants-Appellees,

v.

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, ABRAHAM E. FREEDMAN,

Defendants-Appellees-Appellants,

MARTIN SEGAL and LEON KARCHMER,

Defendants-Appellees.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Plaintiffs-Appellants and no active circuit judge having requested that a vote be taken on said suggestions.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

APPENDIX K

Order Granting Defendant Perry's Petition for Rehearing and Supplementing Opinion.

The application for a rehearing is granted.

The following paragraph shall be added to the last page of the opinion of the Court:

> "D. Jurisdiction with respect to claim against Perry We hold that the district court was correct in finding that it had jurisdiction to enter and in entering a personal judgment against William Perry and in favor of the Pension Plan in the amount of $263,307.00."

In all other respects we adhere to our original decision.

J. Joseph Smith
/s/ J. Joseph Smith

Paul R. Hays
/s/ Paul R. Hays

Wm. H. Timbers
U.S.C.JJ.
/s/ William H. Timbers

August 6, 1973.

APPENDIX L

Stipulation of Amounts Paid to the NMU Officers' Pension Plan on Account of Non-Elected Persons.

Salaries		*Contribution*	*Interest*
Total 1/8/71	6,388,006	1,689,597	385,972
Adjusted as 7/1/71	113,575	— 31,729	— 2,605
	6,274,431	1,657,868	383,367
Agreed	111,337	— 28,947	— 2,787
	6,163,094	1,628,921	380,580
	—	—	57,011
Interest Adjusted 6/1/70 to 7/1/71			
Total		Interest	437,591
		Contributions	1,628,921
7/1 =	2,099,260		
adjusted	2,066,512		2,066,512
	32,748	to 8/23/71	14,661
			2,081,173
1/1/71 =	2,075,569		
Interest to 12/10/70		1,628,921	
1 mo. = 8144.60			
1 day = 271.86		to 8/23 =	$14,661.00

APPENDIX M

Plaintiffs' Demand to Bring This Action.

EXHIBIT A, ANNEXED TO COMPLAINT

James M. Morrissey
2621 Palisades Avenue
New York 10463, New York

May 17, 1968

Mr. Shannon Wall
National Secretary-Treasurer
National Maritime Union
36 Seventh Avenue
New York, New York

Dear Sir:

The Undersigned, a member of the National Maritime Union of America, hereby makes demand upon you, upon the National Maritime Union of America, and upon the latter's National Office, that you, the said organization, and the latter's officers and governing body sue and/or recover damages and secure an accounting or other appropriate relief for any and all losses, liabilities, expenses and/or expenditures suffered by the National Maritime Union of America because of or by reason of the purported coverage, in the NMU Officers' Pension Plan, as revised and amended on and after October 28, 1961, of persons not in fact officers of NMU as defined in the NMU Constitution.

In particular, the undersigned makes demand that the National Maritime Union of America, its officers and/or governing body, bring suit or other proceeding to recover for the National Maritime Union of America all moneys contributed pursuant to or by reason of the said NMU Officers' Pension Plan to any fund or other repository for

the payment of any pension or pensions to any person or persons employed by the National Maritime Union in the capacity of "Assistant to the President", "Publicity Director and Editor of the Pilot", "Executive Secretary", "Maintenance Supervisor", "Bookkeeping Supervisor", "Records and Supplies Supervisor", or in any other capacity not that of an elected officer.

Fraternally,

Name: JAMES M. MORRISSEY

Book Number: 34210

Address: 2621 Palisades Ave.
New York 10463, N. Y.

Appendix M.

Exhibit "A"

No. 761078

Receipt For Certified Mail—30¢

Sent To

Shannon Wall NMU

Street and No.

36 Seventh Ave.

P.O. State and Zip Code

New York, N. Y., 10004

Extra Services For Additional Fees

Return Receipt

Shows to whom and date delivered

☒ 10¢ fee

Shows to whom, date, and where delivered

☐ 35¢ fee

Deliver to Addressee Only

☐ 50¢ fee

POD form 3800
Mar. 1966

No Insurance Coveraged Provided—
Not For International Mail

(See other side)

Postmark or date

New York, N. Y.

May
17
1968

G.P.O.

APPENDIX N

Agreement and Declaration of Trust "for the Exclusive Benefit of" the "Elected Officials" of NMU.

AGREEMENT and DECLARATION OF TRUST dated as of December 29, 1952, by and between the [National Maritime Union of America, CIO,] (hereinafter referred to as the "Union"), and [Herman E. Cooper, Martin E. Segal and Leon Karchmer,] (hereinafter referred to as the "Trustees"), as Trustees under this Agreement and Declaration of Trust.

WITNESSETH:

WHEREAS, the [National Maritime Union of America, CIO,] desires to establish and maintain a trust fund for the exclusive benefit of its elected officials through payments, upon the terms, and subject to the conditions and limitations contained in this agreement; and

WHEREAS, the Trustees have declared and do hereby declare that they will receive, hold, administer and dispose of all money and securities paid, transferred, or delivered to them as Trustees, pursuant to the provisions of this Agreement and Declaration of Trust, with the duties and powers and for the uses and purposes herein set forth, and none other;

NOW, THEREFORE, in consideration of the premises, it is mutually agreed between the parties, as follows:

I. DEFINITIONS.

Wherever used in this Agreement and Declaration of Trust:

1. "Agreement" means this Agreement and Declaration of Trust.

2. "Union" means the [National Maritime Union of America, CIO.]

3. "Trustees" means the Trustees designated herein, as well as their successors designated in the manner herein provided.

4. "Fund" means all moneys and property paid to the Trustees and all securities purchased by the Trustees, pursuant to the provisions of this agreement, together with all interest or other income thereon, and the net proceeds of any sale or other disposition of such securities.

5. "Plan" means the Pension Plan adopted by the Trustees, pursuant to the terms of this agreement.

6. "Officer" means a person holding any one of the following offices, in accordance with the provisions of the Union Constitution:

   a) National President

   b) National Secretary

   c) National Treasurer

   d) Vice President

   e) National Port Committee Member

   f) Branch Agent

   g) Field Patrolman

   h) Patrolman

II. Source of Assets of the Fund.

1. In consideration of this Agreement and upon its execution, the Union agrees to pay to the Trustees an initial payment of $80,000.00.

2. Commencing with the calendar quarter of January 1, 1953, to March 31, 1953, and for each calendar quarter thereafter, the Union agrees to pay to the Trustees a sum of money equal to 23% of the compensation paid by the Union to the officers of the Union for the calendar quarter then ending. Such payment shall be due within ten days after the end of each calendar quarter.

III. The Trustees.

A. *Terms of Office and Successors*

1. The Trustees designated herein shall continue to serve as Trustees for life, unless they or any one of them resign or become incapable of discharging their duties as Trustees. A resignation must be submitted in writing to the President of the Union and the question of a Trustee's incapacity to discharge his duties shall be conclusively determined by the other Trustees.

2. In the event of a vacancy created by the death, resignation or incapacity of one of the Trustees, the remaining two Trustees shall immediately meet and designate a successor Trustee, who shall serve for the same term and upon the same terms and conditions as his predecessor. In the event that the remaining Trustees are unable to designate a successor Trustee, such designation shall be made by a majority vote of the National Officers of the Union.

3. During the interim period prior to the designation of a successor Trustee, the remaining Trustees acting in the manner herein provided, shall administer the affairs of this trust fund.

Appendix N.

B. *Meetings and Voting*

1. Decisions of the Trustees shall be made by the concurring vote of the majority of the Trustees. The vote of the Trustees may be cast by them in person at a meeting, or may be evidenced by a written instrument signed by them, or telegrams from a requisite number of Trustees, after written notice to all of the Trustees of the question to be decided.

2. Any Trustee may call a meeting of the Trustees at any time by giving written notice not less than forty-eight hours in advance of the time and place thereof to each Trustee. Meetings of the Trustees may also be held at any time without notice if all the Trustees consent thereto.

3. A majority of the Trustees, present in person at any meeting, shall constitute a quorum for the transaction of business.

C. *Powers and Duties*

1. The Trustees shall, as soon as practicable after the execution of this Agreement and Declaration of Trust, meet and adopt a Pension Plan for the purpose of paying retirement benefits to the officers of the Union. The Trustees shall have full and sole discretion to determine the amount of such benefits and the terms and conditions of payment and shall have the power to conclusively determine all questions concerning the payment of benefits to any individual recipient or prososed recipient.

2. The Trustees shall deposit all moneys received by them in such bank or banks as they may designate for that purpose and in such manner as the Trustees, in their sole discretion, shall determine. The Trustees shall invest and

reinvest such moneys as in their sole discretion they may determine are not required for current expenditure in any securities and without distinction between principal and income. The Trustees, in their discretion, may keep such portion of the Fund in cash or cash balances as the Trustees may, from time to time, deem to be in the best interests of the Fund.

3. The Trustees are authorized and empowered:

(a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by them by private contract or at public auction.

(b) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all instruments that may be necessary or appropriate to carry out the powers herein granted.

(c) To register any investment held in the Fund in their own names or in the name of a nominee and to hold any investment in bearer form, but the books and records of the Trustees shall at all times show that all such investments are part of the Fund.

4. The Trustees shall not be liable for the making, retention, or sale of any investment or reinvestment as made by them, as herein provided, nor for any loss to, or diminution of the Fund, except due to their own wilful misconduct.

5. The Trustees shall be protected in acting upon any paper or document believed by them to be genuine and to have been made, executed, or delivered by the proper party purporting to have made, executed or delivered the same, and shall be protected in relying and acting upon the opinion

of legal counsel (including opinion of legal counsel who is or may be a trustee hereunder) in connection with any matter pertaining to the administration or execution of this Trust Fund. No Trustee shall be liable for any action taken or omitted by him unless such act or omission is the result of wilful misconduct, nor for the acts of any agent, employee, or attorney selected by the Trustees with reasonable care, nor for any act or omission of any other Trustee.

6. No party dealing with the Trustees in relation of this Trust Fund shall be obliged to see to the application of any money or property of the Trust Fund, or to see that the terms of this Trust Fund have been complied with, or be obliged to inquire into the necessity or expediency of any act of the Trustees, and every instrument executed by the Trustees shall be conclusive in favor of every person relying thereon: (a) that at the time of delivery of said instrument the Trust Fund hereby created was in full force and effect, (b) that said instrument was executed in accordance with the terms and conditions contained in this agreement, and (c) that the Trustees were duly authorized and empowered to execute such instrument.

7. The receipt given by the Trustees for any money or other property received by them shall effectually discharge the person or persons paying or transferring the same, and such person or persons shall not be bound to see to the application, or be answerable for the loss or misapplication thereof.

8. The Trustees may deduct from and charge against the Trust Fund any taxes paid by them, which may be imposed upon the Trust Fund, the income, property, or transfer thereof, or of any part thereof, or upon or with respect to the interest of any individual therein, which the

Trustees are required to pay. The Trustees, in their discretion, may contest the validity or amount of any tax, assessment, claim or demand which may be levied or made against, or in respect of the Trust Fund, or against or in respect of any part of the Trust Fund, the income, property or transfer thereof, or in any matter or thing connected therewith.

9. The Trustees shall be empowered to obtain and determine compensation for legal counsel, accounting, technical, actuarial and investment services and such administrative assistance as they may, in their discretion, find necessary. If any Trustee shall have a financial interest in a firm whose services are desired by the Fund, that Trustee shall not participate in discussions or decisions relating to the retention of such firm or the terms and conditions of compensation for the services to be rendered.

10. The Trustees may delegate any of their ministerial powers and duties hereunder to one or more of the Trustees or to one or more officers of the Union designated by them for that purpose.

11. In the event of any ambiguity, the Trustees shall have the power to construe this Agreement and Declaration of Trust, and their construction of the same shall be final and conclusive.

12. The Trustees shall have all other powers necessary and proper to the carrying out of the purposes of the Trust.

IV. The Union.

1. The Union shall promptly pay to the Trustees the contributions due, in accordance with the provisions of

this agreement, or of the Pension Plan adopted pursuant to this agreement, or, if the Trustees so direct, to deposit such contributions in such depository as the Trustees shall designate.

2. The Union shall provide the Trustees with all records and information requested by the Trustees and designated by the Trustees as being necessary to the performance of their duties.

3. Liability for the payment of the pensions and benefits provided for under the Pension Plan adopted pursuant to the within Agreement and Declaration of Trust and any other liability arising under or out of this agreement shall be limited exclusively to the assets of the Trust Fund, and in the event that such assets are at any time insufficient to provide for the payment of any pension or benefit payments due under the Pension Plan, or any other such liability, no liability for the payment thereof shall attach to or may be asserted against the Trustees.

V. MISCELLANEOUS.

1. Notwithstanding anything to the contrary contained in this Agreement and Declaration of Trust, as now expressed or hereafter amended, it shall be impossible at any time for any part of the trust corpus or income to revert to the Union or to be used for or diverted to any purpose other than the exclusive benefit of the eligible officers, through the payments, upon the terms, and subject to the conditions and limitations contained in the Pension Plan adopted pursuant to this agreement, or in the event of termination, in such manner as shall be designated by the Trustees.

2. No officer, or any individual claiming by, through, or under any officer, shall have any right, title or interest in or to or claim against the trust fund or any part thereof, except the right to receive pensions or benefits in the amounts and subject to the terms and conditions provided in the Pension Plan.

3. Neither the pension nor any other benefit under the Pension Plan, nor the assets in the individual account of an officer entitled to receive such pension or benefits shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, and any attempt so to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge the same shall be void; nor shall any such pension or other benefit or such assets be in any manner, whether by action of the officer or his beneficiary or by operation of law, liable for or subject to the debts, contracts, liabilities, engagements or torts of the person entitled to such pension or other benefit.

4. Every individual receiving or claiming a pension or other benefit under this Agreement and Declaration of Trust or Pension Plan enacted pursuant hereto, shall be conclusively presumed to have been competent until the date on which the Trustees shall have received written notice, in a form and manner acceptable to them, that such an individual is an incompetent or a minor, for whom a guardian or other person legally vested with the care of his person or estate shall have been appointed; provided, that the Trustees may, in their discretion, validily recognize actions by, and conduct transactions with, others acting, prior to the receipt of, or in the absence of such written notice, in behalf of an individual found by the Trustees to be an incompetent or a minor, if the Trustees shall find such actions or transactions to be in the best interests of such individual.

5. This agreement and the Trust Fund and Pension Plan established hereunder and pursuant hereto have been executed in the State of New York and all questions pertaining to the validity or construction of this instrument and of the acts or transactions of the parties hereto shall be determined in accordance with the laws of the State of New York.

6. In case any provisions of this agreement shall be held illegal or invalid for any reason, said illegality or invalidity shall not affect the remaining parts of this agreement, but this agreement shall be construed and enforced as if said illegal and invalid provisions had never been inserted herein.

VI. Termination.

1. The trust created by this Agreement and Declaration of Trust shall terminate: (a) When the Trustees, in their sole discretion, determine that the purposes of this Agreement can no longer be carried out; (b) upon the affirmative vote of two-thirds of the membership of the Union, but in no event shall the trust be terminated by vote of the membership for a period of at least twenty years from the date of execution of this Agreement and Declaration of Trust.

2. If there shall be assets remaining in the Trust Fund upon the termination of this trust, such remaining assets shall be distributed and disposed of in such manner and upon such terms and conditions as the Trustees shall, in their sole discretion, determine.

VII. Amendments.

1. This Agreement and Declaration of Trust may be amended at any time by an instrument in writing, executed by the President of the Union and a majority of the Trustees.

Appendix N.

VIII. NAME.

The fund established by this Agreement and Declaration of Trust shall be known as the ["National Maritime Union Officers' Pension Fund"], and the Trustees may conduct business under that name.

IN WITNESS WHEREOF, the Trustees and the [National Maritime Union of America, CIO], by its duly authorized officers, have executed this Agreement and Declaration of Trust to evidence their acceptance of the trusts hereby created and their agreement to be bound thereby.

[NATIONAL MARITIME UNION OF AMERICA, C.I.O.]

JOSEPH CURRAN

By: .....

Joseph Curran, National President

NEAL HANLEY

.....

Neal Hanley, National Secretary

M. HEDLEY STONE

.....

N. Hedley Stone, National Treasurer

TRUSTEES:

HERMAN E. COOPER

.....

Herman E. Cooper

LEON KARCHMER

.....

Leon Karchmer

MARTIN E. SEGAL

.....

Martin E. Segal

APPENDIX O

NMU Officers Pension Plan.

NMU Officers Pension Plan

Pursuant to Article III, Section C, Subsection 1, of the Agreement and Declaration of Trust establishing the NMU Officers Pension Fund, the Board of Trustees, by resolution on Feb. 16, 1953 duly adopted the following Pension Plan.

Article I. General Purpose

This Pension Plan is to be used as a medium for providing retirement benefits for eligible officials of the NMU. The Plan is geared to retirement benefits for officers who reach the age of sixty-five and have been in office for twenty years or more. Provision is also made for a reduced pension for those officers who reach the age of sixty-five but have less than twenty years in office. Other benefits are provided for officers whose terms of office terminate before they reach sixty-five. This Plan sets forth the full details of the benefits and the eligibility requirements.

Article II. Definitions

Unless the context or subject matter otherwise requires, the following definitions shall govern in this Pension Plan:

Section 1. *"Pension Fund"* shall mean the NMU Officers Pension Fund established pursuant to the Agreement and Declaration of Trust dated Dec. 29, 1952, together with any modifications or amendments thereto.

Section 2. *"Pension Plan"* shall mean the NMU Officers Pension Plan, as contained in this document, together with any modifications or amendments hereto.

Appendix O.

Section 3. *"Board of Trustees"* shall mean the Board of Trustees named in the Agreement and Declaration of Trust dated Dec. 29, 1952, establishing the Pension Fund, and as constituted from time to time in accordance with the provisions of said Agreement and Declaration of Trust.

Section 4. *"NMU"* shall mean the National Maritime Union of America, C.I.O.

Section 5. *"Officer"* shall mean a person holding any one of the following offices in accordance with the provisions of the NMU constitution:

(a) National President

(b) National Secretary

(c) National Treasurer

(d) Vice President

(e) National Port Committee Member

(f) Branch Agent

(g) Field Patrolman

(h) Patrolman

Section 6. *"NMU Constitution"* shall mean the constitution of the NMU in force and effect at the time of adoption of this Pension Plan, together with any amendments thereto.

Section 7. *"Covered Employment"* shall mean employment as an officer of the NMU.

Section 8. *"Term of Office"* shall mean the period of time for which an officer is elected to serve in accordance with the provisions of the NMU constitution.

Section 9. *"Average Monthly Salary"* shall mean the total compensation payable to the officer pursuant to the provisions of the NMU constitution for all periods of employment after Aug. 1, 1952, divided by the number of months of such employment.

Section 10. *"Annual Salary"* shall mean the total compensation payable to the officer pursuant to the provisions of the NMU constitution for all periods of employment between Aug. 1 of any one year and July 30 of the following year.

Section 11. *"Applicant"* shall mean a person making application for benefits under this Pension Plan.

Section 12. *"Pensioner"* shall mean a person receiving benefits under this Pension Plan.

Section 13. *"Beneficiary"* shall mean the person or persons designated by the officer in a form prescribed by the Trustees as the person or persons entitled to receive any benefits that may be payable as a result of the officer's death.

Section 14. The use of the masculine gender shall be construed as including the feminine gender as well.

ARTICLE III. REGULAR PENSION BENEFITS

Section 1. An officer shall be eligible for a Regular Pension Benefit if he

(a) Has attained the age of sixty-five years,

and

(b) Has credit for twenty-years or more of covered employment including at least six months of covered employment since Aug. 1, 1952.

Appendix O.

Section 2. The Regular Pension Benefit shall be a monthly payment in an amount equal to 50% of the applicant's average monthly salary. The resulting figure shall be rounded off to the next higher whole dollar amount.

Section 3. An officer whose application for benefits under this Article is approved shall be entitled, upon retirement, to receive the Regular Pension Benefit for the remainder of his life subject, however, to all the provisions of this Plan. The first monthly benefit payment shall be payable for the calendar month immediately following approval of the application for benefits. The last monthly benefit payment shall be payable for the calendar month in which the pensioner dies. If the pensioner dies before receiving 120 Regular Pension Benefit payments, his beneficiary shall be paid the Regular Pension Benefit for the number of months, which, when added to the number of Regular Pension Benefits received by the pensioner while alive, will total 120.

Section 4. No officer shall be entitled to benefits under this Article, if, at the time of his application or thereafter, he has received or been approved for benefits under Article IV or Article V of this Pension Plan.

ARTICLE IV. REDUCED PENSION BENEFITS

Section 1. An officer shall be eligible for a Reduced Pension Benefit if he

(a) Has attained the age of sixty-five years,

(b) Has credit for ten years or more of covered employment, including at least six months of covered employment since Aug. 1, 1952.

Section 2. The Reduced Pension Benefit shall be a monthly payment in an amount equal to that portion of

50% of the applicant's average monthly salary which the number of years of the applicant's credited covered employment bears to twenty. The resulting figure shall be rounded off to the next higher dollar amount.

Section 3. An officer whose application for benefits under this Article is approved shall be entitled, upon retirement, to receive the Reduced Pension Benefit for the remainder of his life subject, however, to all the provisions of this Plan. The first monthly benefit payment shall be payable for the calendar month immediately following approval of the application for benefits. The last monthly benefit payment shall be payable for the calendar month in which the pensioner dies. If the pensioner dies before receiving 120 Reduced Pension Benefit payments, his beneficiary shall be paid the Reduced Pension Benefit for the number of months, which, when added to the number of Reduced Pension Benefit payments received by the pensioner while alive, will total 120.

Section 4. No officer shall be entitled to benefits under this Article if, at the time of his application or thereafter, he has received or been approved for benefits under Article III or Article V of this Pension Plan.

ARTICLE V. EARLY RETIREMENT PENSION BENEFITS

Section 1. For the purpose of this Article, each officer shall be deemed to have an "Early Retirement Account."

Section 2. After completion of each full year of covered employment after Aug. 1, 1952, an amount equal to 12.5% of the officer's annual salary for that full year shall be deemed credited to the officer's Early Retirement Account.

Section 3. For all officers who were officers on Oct. 1, 1952, there shall be deemed credited to each such officer's Early Retirement Account an amount equal to 12.5% of the officer's annual salary payable for the period of Aug. 1, 1952, to July 30, 1953, multiplied by the number of years of credit the officer has for covered employment prior to Oct. 1, 1952. For the purpose of this Section, Exhibit "A" is annexed hereto, which lists the names of all persons who were officers on Oct. 1, 1952, and the number of years that shall be credited for covered employment prior to Oct. 1, 1952, for each officer included in said Exhibit "A." Exhibit "A" shall be controlling for all amounts credited pursuant to this Section.

Section 4. The Early Retirement Pension Benefit shall be the amount of money deemed credited to the officer's account in accordance with Sections 2 and 3, above. The amount of the benefit shall be computed as of the date the officer makes application for same.

Section 5. An officer shall be eligible for an Early Retirement Pension Benefit if at the time of his application:

(1) He has credit for *six years* or more of covered employment, including at least *six months* of covered employment since Aug. 1, 1952,

AND

(2) His covered employment has been terminated and he has not been elected to covered employment for the next ensuing term of office,

AND

(3) He certifies that he is no longer engaged in covered employment.

Section 6. An officer eligible for the Early Retirement Pension Benefit under this Section shall have the following

options with respect to receiving payment of such benefit:

(1) He may receive the amount of equal monthly payments over a three year period following approval of his application, or

(2) He may receive the amount in equal monthly payments over a five year period following approval of his application, or

(3) He may receive the amount in equal monthly payments over a ten year period following approval of his application, or

(4) He may receive a monthly pension benefit for the remainder of his life in an amount that can actuarially be provided by such sum.

Section 7. After an officer's termination of covered employment, he may apply to the Board of Trustees for a determination of the amount credited to his Early Retirement Account, as hereinabove provided, and a determination of the benefits that would be payable to him under each of the four options outlined in Section 6, above. The Trustees shall then determine such amounts and advise the officer of same. After the officer has received notification of such amounts, he shall then have sixty days within which to exercise his option under this Article. If he fails to exercise his option then the Trustees shall exercise the option on his behalf.

Section 8. If the officer's covered employment is terminated by death, his beneficiary shall have the right to receive the Early Retirement Benefit provided in this Article as though the deceased officer were alive and making application for such benefit.

In the event of the death of an officer, after electing options (1), (2), (3), or (4), in Section 6 above, his bene-

ficiary shall be entitled to receive the Early Retirement Benefit for the balance of the period remaining after the officer's death, as determined by the option elected by the officer.

Section 9. No officer shall be entitled to benefits under this Article, if at the time of his application or thereafter, he has received or been approved for benefits under this Article III or Article IV of this Pension Plan.

ARTICLE VI. APPLICATION FOR AND PAYMENT OF BENEFITS

Section 1. An officer may apply for benefits under Article III, Article IV, or Article V before his covered employment terminates; however, no such application may be finally approved or benefits paid until the officer's covered employment terminates and the officer certifies that he is no longer engaged in covered employment.

Section 2. No benefits under Article III, Article IV, or Article V shall be paid for any month in which the officer is engaged in covered employment.

Section 3. Once a benefit is paid under either Article III, Article IV or Article V, no officer or beneficiary shall be entitled to receive any other benefits under this Pension Plan except in accordance with the Article under which the benefit is paid.

Section 4. Application for benefits shall be made in writing to the Board of Trustees. Each and every officer, pensioner and beneficiary shall furnish to the Board of Trustees any information or proof requested by it and reasonably required to administer this Pension Plan and determine eligibility for benefits hereunder.

Section 5. This Pension Plan shall become effective immediately.

Section 6. To the end of making it impossible for officers, pensioners and beneficiaries covered by this Pension Plan to improvidently imperil the provisions made for their retirement or welfare by directly or indirectly anticipating, pledging, or otherwise disposing of benefit payments that may be due them hereunder, is is hereby expressly provided that no officer, pensioner, or beneficiary shall have any right to assign, alienate, transfer, sell, hypothecate, mortgage, encumber, pledge, commute or anticipate any benefit payment that may be made under this Pension Plan, and further, that such payments shall not in any way be subject to any legal process, to levy of execution, to attachment or garnishment proceedings, nor shall such payments be subject to the jurisdiction of any bankruptcy court or insolvency proceedings by operation of law or otherwise, and any such assignment, etc., shall be void and of no effect whatsoever.

Section 7. If an officer or pensioner, at the time of his death, does not have on file in the office of the Pension Fund a valid and duly executed designation of beneficiary, then, at the time of the officer's death, the Trustees, in their sole discretion, may determine the benficiary from among the following:

(a) wife of the pensioner,

(b) children of the pensioner,

(c) father of the pensioner,

(d) mother of the pensioner,

(e) brothers and sisters of the pensioner,

(f) personal representative of the pensioner's estate.

Such designation of the beneficiary by the Board of Trustees shall then be deemed, for the purpose of this Pension Plan, as the beneficiary designated by the officer or pensioner and the use of the word "beneficiary" throughout the other Sections of the Pension Plan shall be deemed to mean the beneficiary so determined by the Board of Trustees.

Where, under this Section, benefits become payable to a person under 21 years of age, the amount may be paid to such person—without requiring the appointment of a guardian—by paying such amount to anyone over the age of 21 years who submits satisfactory proof that he or she is suppotring and maintaining such person, and gives assurance to the Trustees in form satisfactory to them that the money so paid over will be used for such purposes.

Section 8. If the total amount of benefit due an officer under Article V is $5,000 or less, the Board of Trustees, in their sole discretion, may make a lump sum payment of said amount upon approval of the officer's application for benefits under that Article and such payment shall be deemed full and complete payment of benefits under that Article. If the Board of Trustees exercises the right granted by this Section, the options provided in subdivisions (1), (2), (3) and (4) of Section 6 of Article V, shall be deemed inoperative.

Article VII. Crediting Covered Employment

Section 1. Credit for covered employment shall be determined as provided in this Article.

Section 2. Covered employment shall be credited only in full year units.

3. An officer shall be given credit for covered employment after Aug. 1, 1952, for the period of time he is employed by the NMU in one of the official capacities listed in Article II, Section 5, of this Plan and for which employment he receives a salary from the NMU. For the purpose of this Section, a full year of covered employment shall be deemed to be 340 days in any period of 365 consecutive days.

Section 4. An officer shall be given credit for covered employment before Aug. 1, 1952, only if such officer is listed on Exhibit "A," attached hereto, and in such case the amount of credit for such covered employment shall be as indicated on Exhibit "A."

Section 5. If an officer is disabled because of injury or sickness during the term of his office, it shall be presumed that he is engaged in covered employment for any period of such disability. Disability for the purpose of this Section shall mean total incapacity, because of injury or illness, to perform the duties of an officer of the NMU. The officer shall have the burden of proving such disability to the Board of Trustees. The Board of Trustees, in its sole discretion, may then decide whether such period of disability shall be deemed covered employment. In no event shall credit be given for a period of disability which extends beyond the officer's term of office.

Section 6. If an officer's salary is not paid to the officer by the NMU because of his absence from employment due to a reason other than disability because of injury or sickness, the period of such absence shall be deemed to be a period of time in covered employment if the absence is involuntary on the part of the officer and due to circumstances beyond his control. The Board of Trustees in its sole discretion may decide whether credit shall be given for such period of absence and the officer shall have the burden of proving the facts to the Board of Trustees. In

no event shall credit be given for a period of absence which extends beyond the officer's term of office.

Section 7. No credit shall be granted for covered employment for any period of time preceding the payment of benefits under Article III, IV or V, if an officer engaged in covered employment after receiving such benefits, except for the six year qualification provision of Section 5 (1), Article V.

Section 8. If an officer has not been engaged in covered employment for any ten consecutive year period, he shall not be credited with any period of covered employment prior to his re-employment as an officer.

ARTICLE VIII. AMENDMENT AND TERMINATION

Section 1. The Board of Trustees may amend or modify this Pension Plan at any time in accordance with the Agreement and Declaration of Trust. However, benefits accrued prior to amendment shall not in any event, be reduced or eliminated.

Section 2. If the Plan is discontinued, the assets then remaining in the Pension Fund (after providing the expenses of the Pension Plan), shall be allocated, to the extent that they shall be sufficient, for the purpose of paying retirement benefits (based on creditable covered employment to the date of discontinuance of the Plan) in the following order of priority:

(a) to continue the payment of Regular, Reduced or Early Retirement Benefits to pensioners whose application for such benefits had been finally approved at the time of discontinuance of the Plan;

(b) to provide for the payment of Regular Pension Benefits to officers who have attained the age of 65, or over, on the date of discontinuance of the

Plan, without reference to the order in which they shall apply for or be approved for Regular Pension Benefits;

(c) to provide for the payment of Reduced Pension Benefits to officers who have attained the age of 65, or over, on the date of discontinuance of the Plan, without reference to the order in which they shall apply for or be approved for Reduced Pension Benefits;

(d) to provide for the payment of benefits under Articles III, IV, or V, to beneficiaries of deceased officers or pensioners.

(e) to provide Early Retirement Benefits to officers whose employment terminates after the discontinuance of the Plan without regard to the order in which such applications are made or approved.

Section 3. If, after providing for all of the foregoing, any funds then remain, the Board of Trustees may use such funds in whatever manner they deem proper to carry out and effectuate the purpose of this Pension Plan in providing retirement benefits for officers. However, under no circumstances may any portion of the Pension Fund revert to or be paid to the NMU.

We, the undersigned Trustees, certify that the foregoing Pension Plan was duly adopted at a meeting of the Trustees of the NMU Officers Pension Fund held on the 16th day of February, 1953.

..... (/s/ Herman E. Cooper)

..... (/s/ Leon Karchmer)

..... (/s/ Martin E. Segal)

NMU statement of income and expenses of the General Fund for all Ports and National Headquarters for the month of February, 1972

Ports	Operating Receipts: Dues Collected	Initiation Fees	Service Fees	Rental and Servicing Income, Books, Plates and Misc.	Total Receipts	Operating Disbursements: Salaries and Expenses	All Other Operating Disbursements	Total Operating Disbursements
NEW YORK	$ 66,361	$ 2,550	$ 2,140	$ 209	$ 71,260	$ 30,720	$ 6,680	$ 37,400
BALTIMORE	7,445	750	595	6	8,796	4,318	688	5,006
BOSTON	6,880	1,050	1,195	6	9,131	4,079	1,373	5,452
CHARLESTON	4,310	450	430	20	5,210	2,186	474	2,660
CHICAGO	1,488	300	460	8	2,248	2,418	543	2,961
CORPUS CHRISTI	2,658	150	175	6	2,989	2,310	358	2,668
DETROIT	1,855	1,200	210	—	3,265	3,416	231	3,647
GALVESTON	9,205	2,400	350	12	11,967	4,179	562	4,741
HOUSTON	12,237	1,950	1,580	49	15,816	5,312	715	6,027
JACKSONVILLE	2,920	750	210	8	3,888	5,214	528	5,742
JOLIET	2,105	—	385	—	2,490	2,099	140	2,239
LUDINGTON	2,655	150	75	—	2,880	2,156	335	2,491
MIAMI	1,520	300	35	—	1,855	1,866	361	2,227
MOBILE	3,650	750	530	12	4,942	2,425	241	2,666
NEW ORLEANS	20,830	1,050	945	81	22,906	7,196	877	8,073
NORFOLK	7,680	1,350	600	—	9,630	3,326	1,245	4,571
PANAMA	26,094	—	—	6	26,100	6,348	5,350	11,698
PHILADELPHIA	9,930	2,100	930	27	12,987	3,817	692	4,509
PITTSBURGH	6,370	450	910	4	7,734	4,338	638	4,976
PORT ARTHUR	11,995	1,950	330	40	14,315	4,770	451	5,221
ST. LOUIS	4,812	1,350	420	—	6,582	4,364	876	5,240
SAN FRANCISCO	12,740	2,550	955	66	16,311	5,787	2,138	7,925
SAN JUAN	2,876	—	105	2	2,983	3,617	922	4,539
SAN PEDRO	8,880	450	1,295	37	10,662	4,076	158	4,234
SAVANNAH	2,000	150	140	—	2,290	1,937	447	2,384
SEATTLE	5,545	—	460	92	6,097	6,189	1,236	7,425
TAMPA	3,000	600	105	—	3,705	1,983	308	2,291
YOKOHAMA	4,720	450	945	—	6,115	3,651	1,387	5,038
NAT'L HEADQUARTERS				782,983	782,983	92,102	$84,158	626,260
TOTALS	$252,753	$ 25,200	$ 16,510	$783,674	$1,078,137	$226,199	$564,112	$790,311
DEDUCT DISBURSEMENTS					790,311			
EXCESS OF CASH RECEIPTS OVER DISBURSEMENTS					$287,826			

Cash Summary

General Fund Receipts Over Disbursements	$ 287,826
Less: Excess of Payroll Deductions, Mortgage Payment, Exchanges and Various Others Paid-Out Net	9,512
Net Increase in Cash for the Month of February, 1972	278,314
Cash in Bank and on Hand for General Fund, February 1, 1972	2,334,548
Cash in Bank and on Hand for General Fund, February 29, 1972	$2,612,862

Operating Disbursements of National Headquarters to be Apportioned to the Individual Ports on the basis of Total Income of each Port.

SHANNON J. WALL
National Secretary-Treasurer

APPENDIX P

APPENDIX Q

Unexecuted Agreement of Trust, Undated. Submitted After Trial Pursuant to the Direction of the District Court.

AGREEMENT AND DECLARATION OF TRUST

AGREEMENT AND DECLARATION OF TRUST made at New York, New York the day of , 1972 by and between the National Maritime Union of America, AFL-CIO, hereinafter referred to as the "Union," and Alvin Shapiro, hereinafter referred to as the "Trustee."

WITNESSETH:

WHEREAS, the National Office of the Union is vested with the responsibility for fixing the salaries of all technical, clerical and administrative personnel employed by the Union; and

WHEREAS, pursuant to this responsibility the Union desires to make provision for pensions for those of its employees not already provided with pension benefits and is establishing the NMU Employees Pension Plan (hereinafter called the "Plan") for that purpose.

NOW, THEREFORE, the Union and Trustee do hereby agree and declare each with the other as follows:

1. Union hereby establishes with Trustee a trust which will comprise an initial amount to be actuarially determined to be necessary to fund the Plan's obligations and, commencing 1972, and for each month thereafter, a sum equal to twenty-six percent (26%) of the compensation paid by the Union to the Participants for the month then ending, such payment to be made

within ten (10) days after the end of each month. All such money and property, all investments made therewith and proceeds thereof, and all earnings and profits thereon, less the payments which at the time of reference shall have been made by Trustee, as authorized herein, are referred to herein as the "Fund." The Fund shall be held by Trustee in trust and dealt with in accordance with the provisions of this Agreement and Declaration of Trust. At no time shall any of the corpus or income of the Fund be used for or diverted to purposes other than for the exclusive benefit of such Participants and their beneficiaries.

2. It shall be the duty of the Trustee (a) to hold the Fund, (b) to invest and reinvest the Fund, and (c) to make payments to the Participants or their beneficiaries under the Plan. The amount and nature of the benefit program to be provided by the Plan and the terms and conditions of payment shall be determined by the National Office of the Union and furnished in writing to the Trustee. From time to time the Trustee shall cause an actuarial study to be made of the amounts needed to fund the benefits provided by the Plan, and the amount and rate of contribution shall be increased or decreased to reflect the funding needs of the Plan. The Trustee shall be under no duty to enforce payment of any contribution and shall not be responsible for the adequacy of the Fund to meet and discharge any liabilities under the Plan.

3. In addition to the rights, powers and privileges granted by law, and not in limitation thereof, Trustee shall have the following rights, powers and privileges and shall be subject to such of the following restrictions and limitations as are hereinafter set forth:

(a) To invest and reinvest the principal and income of the Fund and keep the Fund invested, without dis-

tinction between principal and income, in any form of property without restriction to investments authorized for fiduciaries. He may keep such portion of the Fund in cash or cash balances as he may from time to time deem to be in the best interests of the Fund.

(b) To vote in person or by proxy on all stocks or other securities in connection therewith, to delegate discretionary powers; to deposit securities under protective agreements or with protective committees, to consent to or otherwise participate in any reorganization, dissolution, consolidation or merger of any corporation, and to pay assessments or charges required in connection therewith; and generally, to exercise with respect to all stocks, bonds or other investments, all such rights, powers and privileges as may be lawfully exercised by any person owning similar property in his own right, subject, nevertheless, to the direction and control of the National Office of the Union;

(c) No bond shall be required of him in any jurisdiction in which he may act;

(d) To make transfers, payments and deliveries to or for the account of Participants and their beneficiaries;

(e) To make, execute and deliver, as Trustee, with provision for no individual liability, all instruments in writing necessary for the exercise of any of the foregoing powers;

(f) To register any property in the name of his nominee, or to hold property unregistered or in such other form that title shall pass by delivery, but without thereby increasing or decreasing his liability as Trustee;

(g) To make distributions hereunder in cash or in kind, or partly in cash and partly in kind.

4. The Trustee shall be protected in acting upon any paper or document believed by him to be genuine and to have been made, executed, or delivered by the proper party purporting to have made, executed or delivered the same, and shall be protected in relying and acting upon the opinion of legal counsel or the Plan's actuary, acting in their appropriate spheres, in connection with any matter pertaining to the administration or execution of this Trust. The Trustee shall have no duties or responsibilities to determine the correctness of the Union's contributions to this Trust or the actuary's computation of benefit payments.

5. The Trustee shall not be required to participate in any litigation, either for the collection of monies or other property due the Fund, or in defense of any claim against the Fund, unless Trustee shall have been indemnified to his satisfaction against all expenses and liabilities to which he might become subject.

6. The Trustee shall keep or caused to be kept accurate and detailed accounts of all investments, receipts, disbursements, and other transactions hereunder and all accounts, books and records relating thereto shall be open to inspection and audit at all reasonable times by any person designated by the National Office of the Union. Within forty-five (45) days following the close of each fiscal year, and within ninety (90) days after the removal or resignation of the Trustee as provided in paragraph 16 hereof, Trustee shall file with Union a written account setting forth all investments, receipts, disbursements, and other transactions effected by him during such fiscal year or during the period from the close of the last fiscal year to the date of such removal or resignation, which account so filed shall be open to inspection during business hours by the National Office of the Union and by the Participants and their bene-

ficiaries for a period of ninety (90) days immediately following the date on which the account is filed with the Union. Upon the expiration of such ninety-day period, Trustee shall be forever released and discharged from all liability and accountability to anyone with respect to the propriety of his acts and transactions shown in such account, except with respect to any such acts or transactions as to which the Union, Participants or beneficiaries shall have filed written objections with the Trustee, within such ninety-day period.

7. The Trustee's duties and responsibilities shall be only those which are expressly imposed upon him by the provisions of this agreement; and he shall not be liable for the making, retention or sale of any investment or reinvestment made by him as herein provided, or for any loss to or diminution of the Fund, nor shall he be liable hereunder except for his own negligence or wilful misconduct.

8. As between Trustee and Participants, their heirs, beneficiaries, executors and administrators on any matter regarding or arising out of this Agreement, the claims of such Participant, his heirs, beneficiaries, executors and administrators shall be limited to the assets of the Fund and Trustee shall not be responsible for any claim in connection therewith.

9. No party dealing with the Trustee in relation to this Trust shall be obliged to see to the application of any money or property of the Trust; or to see that the terms of this Trust have been complied with, or be obliged to inquire into the necessity or expediency of any act of the Trustee, and every instrument executed by the Trustee shall be conclusive in favor of every person relying thereon: (a) that at the time of delivery of said instrument the Trust hereby created was in full force and effect, (b) that

said instrument was executed in accordance with the terms and conditions contained in this Agreement, and (c) that the Trustee was duly authorized and empowered to execute such instrument.

10. The receipt given by the Trustee for any money or other property received by him shall effectually discharge the person or persons paying or transferring the same, and such person or persons shall not be bound to see to the application, or be answerable for the loss or misapplication thereof.

11. The Trustee may deduct from and charge against the Trust any taxes paid by him, which may be imposed upon the Trust, the income, property or transfer thereof, or any part thereof, or upon or with respect to the interest of any individual therein, which the Trustee is required to pay. The Trustee, in his discretion, may contest the validity or amount of any tax, assessment, claim or demand which may be levied or made against, or in respect of the Trust, or against or in respect of any part of the Trust, the income, property or transfer thereof, or in any matter or thing connected therewith.

12. The Trustee, in consultation with the National Office of the Union, shall be empowered to obtain and determine compensation for legal counsel, accounting, technical, actuarial and investment services and such administrative assistance as he may find necessary. The Trustee shall be paid a yearly fee for his services, the amount of such fee to be determined by the National Office of the Union.

13. The Trustee may delegate any of his ministerial powers and duties hereunder to one or more officers or employees of the Union designated by the National Office of the Union for that purpose.

14. In the event of any ambiguity, the Trustee shall have the power to construe this Agreement and Declaration of Trust, and his construction of the same shall be final and conclusive.

15. The Trustee shall have all other powers necessary and proper to the carrying out of the purposes of the Trust.

16. Any Trustee may resign at any time upon sixty (60) days' notice in writing to the Union. Any Trustee may be removed by the Union, by action of its National Office, at any time upon sixty (60) days' notice in writing to the Trustee. Upon such resignation or removal of Trustee, the Union, by action of its National Office, shall appoint a successor Trustee who shall have the same powers and duties as those conferred upon Trustee hereunder and, upon acceptance of such appointment by the successor Trustee, the removed or resigned Trustee shall assign, transfer and pay over to the successor Trustee, funds and properties then constituting the Fund. The removed or resigned Trustee is authorized, however, to reserve such reasonable sum of money as he may deem advisable for payment of his fees and expenses.

17. The Union reserves the right at any time, by action of its National Office, to modify or amend, in whole or in part, any or all of the provisions of this Agreement and Declaration of Trust provided that no such modification or amendment which affects the rights, duties or responsibilities of the Trustee may be made without his consent in writing and provided further that no such modification or amendment shall authorize or permit, at any time, any part of the corpus or income of the Fund to be used for or diverted to purposes other than for the exclusive benefit of Participants and their beneficiaries under the Plan.

18. Trustee hereby accepts this trust and agrees to hold all the cash, securities and other properties now or hereafter constituting the Fund hereunder, subject to all the terms and conditions of this Agreement and Declaration of Trust.

19. This Agreement and Declaration of Trust shall be administered, construed and enforced according to the laws of the State of New York.

IN WITNESS WHEREOF, the National Maritime Union of America, AFL-CIO, by its duly authorized officers, and the Trustee have executed this Agreement and Declaration of Trust to evidence their acceptance of the trust created and their agreement to be bound thereby, as of the date and year first above written.

NATIONAL MARITIME UNION OF AMERICA,
AFL-CIO

by .....
Joseph Curran, National President

by .....
Shannon Wall, National Secretary-Treasurer

by .....
Mel Barisic, National Vice President

by .....
TRUSTEE—Alvin Shapiro

APPENDIX R

District Court Opinion, January 11, 1972.

BONSAL, D. J.

Plaintiffs, three members of the National Maritime Union of America ("NMU"), instituted this action in February, 1969, against defendants Curran and Wall, elected officers of the NMU. Perry, a former employee of NMU and Assistant to the President, and Segal, Freedman and Karchmer, Trustees of the NMU Officers Pension Plan ("the Pension Plan"). The complaint alleged that the Pension Plan had been amended in 1961 so as to include as participants designated employees of the NMU who were not elected officers of the NMU ("non-offcers"), in violation of NMU's constitution then in effect, and that the amendment was for the purpose of siphoning NMU funds to non-officers who were not authorized to receive them. In the complaint, plaintiffs seek an accounting and money damages; an injunction enjoining the Trustees of the Pension Plan from paying any benefits to non-officers; and costs, disbursements and attorneys' fees.

Plaintiffs and defendants both moved for summary judgment and this court granted summary judgment on liability to the plaintiffs, 302 F.Supp. 32 (1969). This court found that the 1960 constitution of NMU did not authorize the inclusion of non-officers in the Pension Plan and that the plaintiffs were entitled to relief under 29 U.S.C. § 501. On appeal, the Court of Appeals affirmed the foregoing determination and, in addition, held that certain amendments to the constitution which were submitted to the membership in 1969 and which would have enabled the union to validate retroactively pensions theretofore paid to non-officers, were exculpatory and void under 29 U.S.C. § 501(a) (the Labor-Management Reporting and Disclosure Act of 1959). (423 F.2d 393 (1970)). The Supreme Court denied certiorari, *Curran* v. *Morrissey*, 399 U.S. 928 (1970);

Appendix R.

Segal v. *Morrissey*, 400 U.S. 826 (1970). The proceeding was remanded to this court for appropriate action declaring the amendments to the constitution to be without effect and enjoining defendants from acting under them. In addition, this court was asked to pass on the issue of whether the defendants should be enjoined from retaining counsel paid or to be paid with NMU funds.

By memorandum filed July 6, 1970, this court held that the amendments to the NMU constitution were without effect, and enjoined defendants from acting under them, and further enjoined defendants from employing counsel paid or to be paid from union funds, and filed an appropriate order to this effect. Thereafter, there was a substitution of counsel on behalf of certain of the defendants.

The issue of damages was tried to the court on August 23, 1971, and following the trial, the parties submitted proposed findings of fact and conclusions of law. At the trial, the parties stipulated that between December 1, 1960 and May 23, 1969 NMU paid to the Pension Plan the aggregate sum of $1,628,921 for the accounts of non-elect personnel employed by NMU. These payments can be broken down as follows:

	Wages	*Contributions*
Patrolmen	$3,968,181.50	$1,021,930.40
Field Patrolmen	214,381.00	55,692.06
Agents	124,586.50	31,015.16
Organizers	315,185.00	81,102.70
William Perry	169,907.00	84,782.58
Staff Employees	1,370,853.00	354,398.10
Total:	$6,163,094.00	$1,628,921.00

However, the parties did not stipulate as to what part of the $1,628,921 was paid for the accounts of non-officers.

Under the prior decision of this court, 302 F.Supp. 32, as affirmed by the Court of Appeals, 432 F.2d 393, it is clear

that NMU employees holding the positions of Assistant to the President, Organizer, Maintenance Supervisor, Bookkeeping Supervisor, Records and Supplies Supervisor, Executive Secretary, Publicity Director and Editor of the Pilot were not officers, and that NMU employees holding union offices enumerated in Article 11 of the NMU constitution in accordance with the provisions of the NMU constitution were officers* and therefore, under Article 14, Section 7 of the 1960 NMU constitution, were authorized to participate in the Pension Plan.

While in 1960 Article 11 of the NMU constitution provided that all union offices would be elective, in 1963 Article 11 was amended to provide that the office of Patrolman would be filled by appointment. In addition, during the entire period involved in this litigation Article 8, Section 9 of the NMU constitution provided that vacancies in elective officers other than National President, National Secretary-Treasurer, or Vice-President could be filled by appointment for the remainder of the unexpired four-year term of office. Accordingly, Patrolmen holding office by appointment under Article 11 of the NMU constitution be-

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* Article 11 of the 1960 NMU constitution entitled "Officers and Term of Office" reads as follows:

"Section 1—National Officers: National Officers of the NMU shall consist of:

(1) National President

(2) National Secretary-Treasurer

(3) Three (3) Vice-Presidents

(4) Three (3) National Representatives

Sec. 2—Other Officers: The officers shall consist of:

(1) A branch for each Branch.

(2) Field Patrolmen as numerically and geographically determined by the National Council.

Sec. 3—Term of Office: All officers shall be elected for a term of four (4) years, to commence as soon as practicable after certification of the election results."

tween 1963 and 1969, when Patrolmen once again became an elective office, see *Wirtz* v. *National Maritime Union of America,* 284 F.Supp. 47 (S.D.N.Y.), *aff'd* 399 F.2d 544 (2d Cir. 1968), and Patrolmen, Filed Patrolmen, and Agents holding office between elections by appointment, pursuant to Article 8, Section 9 of the NMU constitution, were officers in accordance with the provisions of the NMU constitution and therefore were authorized to participate in the Pension Plan.

Of the $1,628,921 paid into the Pension Plan for the accounts of non-elected personnel employed by NMU, $1,108,637.62 was paid to appointed officers holding union office in accordance with the provisions of the NMU constitution, as follows: Patrolman—$1,021,930.40; Field Patrolman—$55,692.06; Agents—$31,015.16. The balance of the $1,628,921, or $520,283.38, was paid into the Pension Plan for the accounts of employees who were not union officers, as follows: Organizers—$81,102.70; the Assistant to the President of NMU (defendant Perry)—$84,782.58; and staff employees—$354,398.10. Since Article 14, Section 7 of the 1960 NMU constitution did not authorize the inclusion of non-officers in the Pension Plan, NMU is entitled to recover from the Trustees of the Pension Plan the $520,283.38 paid into the Pension Plan for the accounts of the non-officers.

The evidence also shows that the Trustees of the Pension Plan paid out of the Pension Plan to non-officers a total of $371,271. These payments can be broken down as follows:

William Perry	$222,200
Sarah Laderhandler	9,201
James Tevan	12,799
Sophia Tevan	11,561
Irving Branch	115,510
Total	$371,271

It also appears from the evidence at the trial that NMU expended a total of $24,151.52 in connection with the adoption of the 1969 amendments to the constitution, which amendments the Court of Appeals found to be exculpatory, void, and of no effect.

Since defendant Perry was a non-officer but, as Assistant to the President of NMU, was in a fiduciary capacity, he will be required to return to the Pension Plan all amounts which he has received from it, together with interest.**

Plaintiffs contend: (1) that the defendants Curran, Wall and Freedman should be required to pay to NMU the $24,151.52 expended in connection with the adoption of the 1969 amendments to the NMU constitution, which amendments the Court of Appeals found to be exculpatory; (2) that the defendants Curran, Wall, Perry and Freedman should be directed to pay to NMU the value of the legal services rendered by Freedman and Sovel in this action; and (3) that the defendants should be "surcharged" with respect to pension payments made by NMU to non-officers, after the order of this court filed May 23, 1969, which plaintiffs assert were for the purpose of circumventing that order. Defendants contend that these claims are not within the scope of this action.

Since the court limited the issues to be determined at the August 23, 1971 trial to (1) the amount wrongfully paid into the Pension Plan; (2) the amount wrongfully paid out of the Pension Plan; and (3) the liability of defendant Perry, plaintiffs' additional claims are not properly be-

---

** Defendant Perry's contention that the court is without subject matter jurisdiction over the claim against him is without merit in view of the Court of Appeals' holding that, "[t]he trial court was correct in finding that all of the defendants were in a position of trust and responsibility in relation to the monies charged to have been unlawfully expended and all had a duty to see that it was restored to the Union treasury." 423 F.2d at 400.

fore the court at this time. However, plaintiffs may notice a hearing for the purpose of determining these additional claims.

Plaintiff may also notice a hearing to determine the personal liability, if any, of the defendant trustees, Freedman, Segal and Karchmer, and officers, Curran and Wall, to NMU for the monies which the Pension Plan has paid out to non-officers and which it is unable to recoup.

Judgment will be entered directing the Pension Plan to pay NMU the $520,283.38 which it received from NMU for the account of non-officers, together with interest to date. Judgment will be entered in favor of the Pension Plan against the defendant Perry in the amount of $222,200. improperly paid to him, together with interest to date.

The foregoing constitutes the court's findings of fact and conclusions of law, F.R.Civ. p. 52(a).

Settle judgments on notice.

Dated: New York, N. Y. January 11, 1972.

DUDLEY B. BONSAL
U.S.D.J.

APPENDIX S

29 U.S.C. § 431 (b)(3), Labor Management Reporting and Disclosure Act of 1959 § 201 (b)(3).

§ 431. Report of Labor Organizations—Adoption and Filing of Constitution and Bylaws; Contents of Report:

(b) Every labor organization shall file annually with the Secretary a financial report signed by its president and treasurer or corresponding principal officers containing the following information in such detail, as may be necessary accurately to disclose its financial condition and operations for its preceding fiscal year—

* * *

(3) Salary, allowances, and other direct or indirect disbursements (including reimbursed expenses) to each officer and also to each employee who, during such fiscal year, received more than $10,000 in the aggregate from such labor organization and any other labor organization affiliated with it or with which it is affiliated, or which is affiliated with the same national or international labor organization;

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-611

ABRAHAM E. FREEDMAN,

Petitioner,

v.

JAMES M. MORRISSEY, JOSEPH PADILLA, and RALPH IBRAHIM, Individually and on Behalf of the Members of the NATIONAL MARITIME UNION OF AMERICA,

Respondents and Cross-Petitioners,

and

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN E. SEGAL and LEON KARCHMER,

Respondents.

BRIEF FOR RESPONDENT MARTIN E. SEGAL IN OPPOSITION

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and

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN E. SEGAL and LEON KARCHMER,

Respondents.

BRIEF FOR RESPONDENT MARTIN E. SEGAL IN OPPOSITION

Preliminary Statement

Martin E. Segal submits this brief in opposition to the cross-petition filed by plaintiffs James M. Morrissey, Joseph Padilla and Ralph Ibrahim for review of a decision by the United States Court of Appeals for the Second Circuit.* Although myriad issues are presented in the cross-petition, and in the petition filed by defendant Abraham

* Since two petitions for certiorari presently are on file, the parties will be referred to as "plaintiffs" and "defendants", respectively.

E. Freedman ("Freedman"), this brief addresses itself to only the two of those issues which affect Martin E. Segal: (a) the question of what sum should be returned by the National Maritime Union Officers' Pension Plan ("Pension Plan") to the National Maritime Union ("NMU") and (b) the question of surcharge on account of payments made out of the Pension Plan to Irving Brauch in April 1966. We submit that neither of these two questions presents an issue appropriate for review by this Court since each involves the application of established legal principles to narrow factual findings made by the United States District Court for the Southern District of New York, which findings of fact and application of legal principles were affirmed in all respects by the United States Court of Appeals for the Second Circuit.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

As noted above, although numerous questions are presented in the petition and cross-petition, Mr. Segal is a respondent with respect to only two of them, which he would restate as follows:

1. Is the construction to be given to certain written instruments in calculating the amount of funds to be returned by the Pension Plan to the NMU an appropriate subject for review by this Court, particularly where the proper construction was unanimously agreed upon by the courts below?

2. Is the factual question of the good faith of a trustee an appropriate subject for review by this Court where the courts below unanimously agreed that the trustee had acted in good faith and where the plaintiffs did not even proffer evidence to the contrary?

PROCEEDINGS BELOW

Due to the extended nature of the proceedings below, a brief description of the history of this litigation might be helpful to the Court.

This action was commenced in February, 1969, pursuant to the provisions of Section 501 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 501 (the "LMRDA"). Soon thereafter, some of the defendants (not including Mr. Segal,* who had not yet been served with process) moved for summary judgment, and the plaintiffs cross-moved for summary judgment. Defendants' motions were denied. Plaintiffs' cross-motions were granted to the extent that the Pension Plan was held to have improperly included as participants certain "non-officer employees" of the NMU. 302 F. Supp. 32 (S.D.N.Y. 1969) [SA 25]**

In February, 1970, the Court of Appeals affirmed the District Court's determination that the NMU constitution, as amended in 1960, did not permit the participation of "non-officers" in the Pension Plan, and remanded the matter to the District Court for further proceedings. 423 F.2d 393 (2d Cir. 1970) [SA 1]. Two separate petitions for certiorari were denied by this Court at 399 U.S. 928 (1970) and 400 U.S. 826 (1970).

After remand, substantial discovery was had and on August 23, 1971, a trial was held solely to determine the amount to be returned to the NMU treasury in accordance with the mandate of the Court of Appeals. On January

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* Mr. Segal is currently an outside trustee of the Pension Plan and has served in that capacity since the Plan's inception. Mr. Segal is Chairman of the Board of Directors of the Martin E. Segal Company, actuaries and pension advisers to the Plan, and has no connection with the union management. [419a-420a; A37]

** References herein by page number are in the form set forth in the petition and cross-petition.

11, 1972, the District Court rendered its opinion setting that amount at $520,283.38. 336 F.Supp. 1107 (S.D.N.Y. 1972) [SA 84].* In that decision, the District Court also determined that the trustees of the Pension Plan had paid out to non-officers the amount of $371,271.** The question of the personal liability, if any, of the defendants in connection with these payments to non-officers was set down for trial.

Plaintiffs presented their evidence on the issue of personal liability on April 13, 14 and May 1, 1972, and, at the close of that evidence defendants moved to dismiss pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. On June 29, 1972 the District Court granted the motions to dismiss as to all payments except those to William Perry ("Perry") [A1].† On July 12, 1972, certain of the defendants, including Mr. Segal, presented evidence of their good faith with regard to the Perry payment, and the matter was taken under submission by the District Court.††

On October 26, 1972, the District Court rendered its opinion surcharging the defendant Freedman, as a trustee of the Pension Plan, for the payment made to Perry, and dismissing the complaint as to all other defendants. 351 F. Supp. 775 (S.D.N.Y. 1972) [A17]. Plaintiffs appealed from this decision and the District Court's decision of January 11, 1972 with respect to the amount of money to

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* With interest, the judgment amounted to $674,222.60 and this judgment has been paid [A3].

** One such non-officer was William Perry and a separate judgment was entered as to him which, with interest, totals $263,307 [A3]. The trustees have initiated supplementary proceedings to collect this judgment but, as yet, to no avail.

† Virtually no evidence was presented to the District Court with regard to any payments except those to Perry, and that Court's dismissal with regard to the other payments was clearly mandated by this total lack of evidence. Except with respect to Mr. Brauch, we do not understand plaintiffs to contend otherwise.

†† Mr. Segal also had presented evidence out of order on April 14, 1972. This evidence was not considered in connection with defendants' motion to dismiss [418a-501a, 685a].

be returned by the Pension Plan to the NMU.* On June 18, 1973, the Court of Appeals rendered its opinion affirming the District Court decision in all respects. [A35].

Plaintiffs then filed a petition for rehearing with a suggestion that the matter be reheard *en banc*. This petition was denied without dissent on July 17, 1973 [SA 45].**

COUNTERSTATEMENT OF FACTS

In the interest of clarity, it is necessary to submit this counterstatement of the facts relevant to the propriety of review of the two issues as to which Mr. Segal is a respondent.

A. Non-Officers v. Non-Elected Personnel

The trust agreement which underlies the Pension Plan was entered into initially in December, 1952, by and between the NMU as settlor and Herman E. Cooper (an attorney), Leon Karchmer and Mr. Segal as trustees [937a-948a].

Throughout this lengthy litigation, it has been conceded that, under the NMU constitution in effect in 1952, the NMU as settlor could have provided in the 1952 trust agreement that not only NMU officers but also any and all other employees of the NMU be included as participants of the Pension Plan.† The NMU, however, apparently did not then desire to include such other employees of the Union in the Pension Plan.

---

* Appeals also were taken by certain of the other parties from one or both of these decisions.

** On August 6, 1973, the Court of Appeals granted a rehearing to the defendant Perry solely to amend its June 18, 1973 opinion to make clear that it affirmed the District Court's finding of jurisdiction over Mr. Perry and entry of judgment against him [SA 46].

† The NMU constitution in effect in 1952 is analyzed in the District Court's May 23, 1969 opinion [SA 25].

In 1960, the NMU constitution was amended to provide as follows:

> "*Pensions: All Officers* shall be eligible for benefits under the NMU Officers' Pension Plan, subject to such rules and regulations as the Trustees of the Plan may establish." (Emphasis added.) [SA 27].

The District Court and the Court of Appeals have agreed that the effect of this amendment was to remove from the National Council of the NMU the power previously vested in it to include "non-officers" in the Pension Plan.

In October, 1961, the Trust Agreement was amended ("1961 Amendment") to broaden the coverage of the Pension Plan to include the following categories of persons: "Union Representatives", defined as persons employed in the position of "Assistant to the President" and "Organizer"; and, "Supervisory or Professional" employees of the NMU occupying the positions of "Maintenance Supervisor", "Bookkeeping Supervisor," "Records and Supply Supervisor," "Executive Secretary," "Publicity Director and Editor of 'The Pilot'." 1961 Amendment, §§ I.7, I.8 and I.9; [SA 27]. The 1961 Amendment was signed by the appropriate officers of the NMU and by each of the Trustees. [949a, 964a].

In September, 1964, the Trust Agreement was once again amended ("1964 Amendment") to broaden the coverage of the Pension Plan [965a-967a]. Under this Amendment, the Pension Plan was to include:

> "All other employees of the Union except (a) any employee whose compensation, hours of work or conditions of employment are determined by or with reference to a collective bargaining agreement, (b) any employee whose customary employment by the Union is for not more than twenty (20) hours in

> any one week or for not more than five (5) months in any one calendar year, and (c) aliens employed in a foreign country."*

It is apparent, and was obvious to the courts below, that, far from being discriminatory, the 1961 and 1964 amendments to the Trust Agreement effectively brought under the coverage of the Pension Plan every full time employee of the Union who was not otherwise covered by a collective bargaining agreement. Each of the amendments to the Trust Agreement, and each corresponding amendment to the Pension Plan, was approved by the membership of the NMU [251a-252a]. Moreover, the 1964 Amendment evidently was occasioned, at least in part, by requirements of the Internal Revenue Service regarding tax exempt pension plans [444a-445a, 997a].

Nonetheless, due to the language of the 1960 Amendment to the NMU constitution, this broadening of the Pension Plan was held improper to the extent that it included persons who were not "officers" of the Union in accordance with the terms of the NMU constitution [District Court Opinion of May 23, 1969; SA 28]. It is clear, however, that this broadening of the Plan was not illegal *per se*, but rather *ultra vires* under the terms of the NMU constitution. In light of this fact, there is no basis for restricting the membership of the Plan beyond that which was mandated by the language of that constitution.

In any event, Mr. Segal submits that the narrow question of the proper interpretation of the NMU constitution is one involving only particular facts and is not worthy of review by this Court.

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* This Amendment also was signed by the NMU and by each of the trustees, including Mr. Freedman who replaced Mr. Cooper as a trustee in 1963 [967a].

B. The Question of Surcharge

Plaintiffs contend that the court below erred in failing to surcharge Mr. Segal for allowing the statute of limitations to run with respect to the payment made to Irving Brauch in April 1966 [859a]. No issue is raised in the cross-petition regarding surcharge of Mr. Segal for the payment made to Perry. Yet whatever meager proof plaintiffs proffered in the District Court on the issue of surcharging Mr. Segal was limited exclusively to the payment made to Perry. Indeed, it was not until July 12, 1972, when the hearings resumed after the District Court had granted defendants' motions to dismiss with respect to all payments except that made to Perry [660a-662a], that the plaintiffs raised their present theory that the Trustees should be surcharged for allowing the statute of limitations to run with respect to Mr. Brauch. And, even after raising this issue at such a late date in this lengthy litigation, plaintiffs offered no evidence to indicate that Mr. Segal was in any respect guilty of bad faith or willful misconduct in not suing Mr. Brauch more than five years and nine months subsequent to the pension payment to him.*

REASONS FOR DENYING THE WRIT

Contrary to plaintiffs' assertions, this case does not present any broad issues of federal labor policy. At least insofar as the issues as to which Mr. Segal is a respondent are concerned, the unanimous decision of the court below affirmed two separate decisions of the District Court which involved only narrow factual questions of interpreting documents and evaluating evidence and, with respect to the

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*As noted above, Mr. Brauch received his pension in April 1966. This payment was not ruled improper until the District Court's decision of January 11, 1972 [SA 84].

surcharge issue, a total lack of evidence. There is no showing in the cross-petition of any "obvious and exceptional error" in these findings of fact.

As to the alleged intracircuit conflict, even if it existed, it would not present grounds for granting the writ. The appropriate procedure to correct such a conflict, when one exists, is to petition for rehearing with a suggestion that the case be reheard *en banc*. *Fed. R. App. P.* 35, 40. Plaintiffs filed such a petition and no circuit judge voted to rehear the case [SA 45]. We submit that the Court of Appeals was correct in refusing to rehear the case since there is, in fact, no intracircuit conflict.

POINT I

The amount to be returned by the pension plan to the NMU is not a question which merits review

A. The Decision Below Affirming the District Court Is Based On Narrow Findings of Fact, Concurred In By Two Courts, Which Do Not Merit Review

This question merely involves the particular facts of this case. They were the subject of concurrent findings by the two courts below. There is no showing of "obvious and exceptional error" which should cause this Court to review such concurrent findings. *See Berenyi* v. *District Director, Immigration and Naturalization Service*, 385 U.S. 630, 635 (1966); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1948).

Under the NMU constitution in effect in 1952, the Trustees and the National Council of the NMU could have admitted to the Plan not only NMU officers, but any and all employees of the Union [SA 3]. In 1960, the NMU constitution was amended to state, in Article 14, Section 7, that:

> "All officers shall be eligible for benefits under the NMU Officers' Pension Plan, subject to such rules and regulations as the Trustee of the Plan may establish." (Emphasis added.) [SA 27].

Both the District Court and the Court of Appeals felt that, in light of the prior history of the NMU constitution, this amendment prohibited participation in the Plan from 1960 on by any person not an "officer" of the NMU in accordance with the union's constitution. Thus, when the matter was remanded after the first appeal, the District Court was faced with the task of determining what amounts had been contributed by the NMU to the Plan on behalf of "non-officers." As set forth in the District Court's January 11, 1972 opinion, the parties stipulated that the total amount of contributions for "non-elected employees", a term which included all "non-officers", was $1,628,921 [SA 85]. The District Court then found that for a period of approximately six years, from 1963 through 1969, the NMU constitution permitted certain officers to be appointed rather than elected. In addition, during the entire period involved in this litigation, the constitution provided that where a vacancy occurred in certain elective offices, the unexpired term would be filled by appointment. These factual determinations are not challenged here. The District Court then determined that $520,283.38 had been contributed on behalf of persons who were not serving as officers in accordance with the terms of the NMU constitution and ordered the Trustees to return that amount, with interest, to the NMU [SA 89].* These findings were unanimously affirmed in all respects by the Court of Appeals [A 35]. They were clearly correct.

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* Including interest, the amount returned by the Trustees to the NMU treasury was $674,220.60 [A 3].

B. Any Alleged Intracircuit Conflicts, Even If They Existed, Would Not Warrant Review

1. There Is No Intracircuit Conflict

Plaintiffs' contention that the decision of the court below is in conflict with its earlier decision in *Wirtz* v. *National Maritime Union of America*, 399 F.2d 544 (2d Cir. 1968), is without merit. *Wirtz* analyzes various provisions of the LMRDA with respect to the requirement that certain officers of a union be elected. However, the decision from which review is sought here has nothing to do with whether a person is required to be elected under the LMRDA, but deals only with whether certain people were entitled to participate in the Pension Plan in accordance with the terms of that Plan and of the NMU constitution. It is clear that, had the NMU constitution so provided, all employees of the NMU—officers and non-officers alike—could have participated in the Pension Plan and, indeed, the participation of those included in the Pension Plan was at all times approved by the membership of the NMU [251a-252a].*

Plaintiffs also contend, erroneously, that the most recent decision of the Court of Appeals is inconsistent with that court's 1970 decision with respect to who may participate in the Pension Plan. As stated by Judge Hays in his opinion of June 18, 1973:

> "The plaintiffs contend that on the prior appeal this court interpreted the NMU constitution to deny coverage to non-elected officers. That issue was not before us on the previous appeal and we did not decide it one way or the other. There is nothing in

* Plaintiffs' assertions about Judge Hays' attempt to override *Wirtz* (Cross-Petition, pages 9-11) are completely answered by the fact that Judge Timbers, the author of the *Wirtz* opinion, was on the panel whose decision plaintiffs seek to review here, and he obviously saw no inconsistentcy.

> our prior opinion which prevents our accepting the ruling of the district court which seems to us to be correct." [A 40].

Two other facts make clear that no such conflict exists. First, as noted above, the entire basis for the earlier opinion was that the 1960 amendment to the NMU constitution prohibited participation by "non-officers". That amendment had nothing whatever to say about "non-elected" personnel.

Second, the specific language of the District Court judgment granting plaintiffs' motion for summary judgment on this issue states:

> "Plaintiffs' motion for summary judgment is granted and judgment will be entered in favor of plaintiffs . . . directing the Trustees to return to the NMU *all moneys received by the Trustees for the benefit of non-officers*, with interest from the dates the moneys were received." (Emphasis added.) (Judgment dated July 11, 1969, pp. 2-3.)

It was this judgment—referring only to "non-officers"—that was affirmed by the earlier Court of Appeals decision.

2. In Any Event, No Ground For Review Is Presented

Moreover, even if this case presented the intracircuit conflicts alleged by plaintiffs, review would not be warranted. While a direct conflict between decisions of different courts of appeals (which is not claimed here) is a basis upon which this Court often grants certiorari, when the claim is only that a second panel in the same circuit has improperly disregarded the decision of an earlier panel the appropriate remedy is review at the circuit level. *Wisniewski* v. *United States*, 353 U.S. 901 (1957); *United States ex rel Robinson* v. *Johnston*, 316 U.S. 649 (1941).

See Fed. R. App. P. 35, 40. Plaintiffs sought review at the circuit level and their petition for rehearing (with a suggestion that it be reheard *en banc*) was denied without dissent.

The two instances referred to at page 9 of the cross-petition in which writs were granted because of intracircuit conflict: *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507 (1950), and *Maggio* v. *Zeitz*, 333 U.S. 56 (1948), were extraordinary situations which have no bearing on this case. As recognized in this Court's opinion in *Maggio*, at that time the Second Circuit had no *en banc* review procedure and the intervention of this Court was occasionally necessary. With a procedure for *en banc* review now in existence in the Second Circuit—one sought by plaintiffs here—the Court should not become involved in the internal administration of the Court of Appeals for the Second Circuit.

POINT II

The question of surcharging Mr. Segal with respect to the Brauch payment does not merit review.

Plaintiffs' contention that Mr. Segal should be surcharged for allowing the statute of limitations to run with regard to the Brauch payment was not seriously pursued in the courts below. Indeed, plaintiffs offered absolutely no evidence of any bad faith or willful misconduct by Mr. Segal in this respect. This total lack of evidence mandated the unanimous decisions below since the operative trust agreements explicitly provided that a Trustee shall not

> "be liable for any actions taken or omitted by him unless such act or omission is the result of willful misconduct . . . ."*

* 1952 Trust Agreement, Section III.C.5 [940a, 941a-942a]; 1961 Trust Agreement, Section III.C.5 [954a-955a, 956a].

As with POINT I above, there is no showing of error to warrant review of the concurrent findings below.

The cases cited by plaintiffs in support of their effort to surcharge Mr. Segal are totally inapposite. In *Village of Brookfield* v. *Tentis*, 101 F.2d 516 (7th Cir. 1939), the court never even considered the *obligation* of the trustee to enforce a possible claim, but only his *right* as a trustee to pursue such a claim. *Grodsky* v. *Sipe*, 30 F. Supp. 656 (E.D. Ill. 1940), involved trustees who had completely neglected their fiduciary duties by general laxity and mismanagement, a claim which has never been made against Mr. Segal throughout this long proceeding.

Moreover, none of the authorities cited by plaintiffs even purport to deal with the effect of an exoneration clause such as that quoted above. Indeed, both the *Tentis* and *Grodsky* decisions relied on Pomeroy, *Equity Jurisprudence* (5th ed. 1941) for their statements of general trustee rights and duties. This work, at page 231, states:

> "Without doubt the trustor in the trust instrument may exonerate the trustee from liability in prescribed circumstances, or the trustee may insist upon such a provision as a condition of his undertaking the trust; and the courts will uphold such provisions and give them effect, at least where the trustee has acted in good faith and there has been no willful misconduct."

The dispositions below were adequate and correct and there is no proper basis for review.

CONCLUSION

The decision of the court below, affirming the findings of the District Court with respect to the matters discussed above, is correct and does not present an issue warranting review by this Court. No question of general federal labor policy is presented. The cross-petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-611

ABRAHAM E. FREEDMAN,

Petitioner,

v.

JAMES M. MORRISSEY, JOSEPH PADILLA, and RALPH IBRAHIM, Individually and on Behalf of the Members of the NATIONAL MARITIME UNION OF AMERICA,

Respondents and Cross-Petitioners,

and

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN E. SEGAL and LEON KARCHMER,

Respondents.

CROSS-PETITIONERS' REPLIES TO BRIEFS IN OPPOSITION

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Preliminary Statement

It is significant that, although the judgment attacked by Mr. Freedman is in favor of the NMU Officers' Pension Trust, none of the defendants, either trustee or union officer, has said one word in opposition to the Freedman petition for a writ. (See plaintiffs' brief in opposition (No. 73-478), pp. 1-2).

Reply to the Defendants Curran and Wall

I

With respect to the payment to Perry:

We do not challenge the facts found by the District Court. The District Court found that Curran "dominated the people who had anything to do with the payment from the Officers' Pension Plan to Perry."

What we do challenge is the failure to charge Curran with this payment, as a matter of law. His domination over the trustees made him responsible for their act in making this improper payment to his good and close friend when he had been warned that the payment would be improper and knew in advance that the payment would be made.

The argument that union officers are entitled to rely on "the opinion of the Union's general counsel" (Curran and Wall brief, pp. 2 and 8) is ill-founded. Curran did not seek advice of counsel on the payment to Perry (our petition, p. 13). In fact, the union's general counsel, Freedman himself, states (Freedman petition, p. 26):

> "Mr. Freedman's only advice was given to the trustees."

But in this situation, it would be surprising indeed if a union official could claim protection from § 501 liability on the basis of any such opportune advice—even had such advice been sought.

II

With respect to the Shapiro trust:

(a) The finding by the Court of Appeals that the money had not been paid to Shapiro is contrary to the NMU financial statement and contrary to Treasurer Wall's testimony (our petition, pp. 20-21).

(b) The Shapiro trust was for the benefit of persons to be selected by Curran. Curran testified that he intended to use the fund to protect those removed by the decree entered in this action (610a). There never was a pension plan so indefinite and uncertain. The Plan (if the document can be so designated) does not designate the class or type of employee beneficiary. It does not require any particular length of service. It does not set forth any guidelines as to how pensions will be computed and how paid. It is a blank check.

The Court of Appeals, in making the finding that the money had never been paid out, relied upon a letter from Mr. Epstein. This letter* was written after the trial had been completed and should not have been allowed to override the testimony of Mr. Wall that the money had been paid.

But even if taken as proof in the case, the letter opened as many questions as it attempted to close; viz, What did Mr. Epstein mean when he said that the $460,363 had been transferred to an interest bearing account "under the control of the Union"? Did he mean that it was under the control of Joseph Curran? Where and by whose authority was the deposit made? In whose name was the deposit made?

Curran and Wall refer to a memorandum which is said to have been read at an alleged May, 1972 meeting "describing the proposed action". Incidentally, this memorandum (Curran-Wall brief, p. 12) was not offered at the trial either but was an enclosure delivered with Mr. Epstein's letter of July 20, 1972, after the trial had been concluded (55-56a). The alleged meeting which purported to approve the February payment was held four months after the deposit was made. By this schedule the approval (if an approval it was) was clearly exculpatory of liability

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* Our petition, p. 19, incorrectly states the date of the Epstein letter as July 20, 1973. It was dated July 20, 1972.

for a wrongful payment and for that reason void under § 501. In fact, the meeting itself was not authorized by the NMU Constitution, Article 4, Section 2(a) (145a). The notice of the meeting was not published in the NMU Pilot as required by that section. Moreover, the notice was misleading and lacked candor. It failed to disclose that the new plan would give the National Office (Curran) power to select participants and fix the amount of their respective benefits. The notice indicated that limits had been placed upon Curran's power to select, designate and apportion (Curran-Wall brief, p. 12), whereas no such limits were written in the Plan. The notice failed to tell the members that the proposed plan had already cost NMU over $460,000. On the contrary, the notice concluded with this statement:

> "It is to be emphasized that the adoption of any or all of the foregoing changes to the NMU Officers' Pension Plan will be subject to the condition that they do not involve any increase in cost to the Union."

Reply to the Defendant Segal

I

The question of who is and who is not an "officer" of a National or International Union does merit review by this Court.

Mr. Segal argues (Segal brief, p. 10) that upon remand "the District Court was faced with the task of determining what amounts had been contributed by the NMU to the plan on behalf of 'non-officers' ". That task should have been simple if reference had been made to the plan itself, which limited the participation to "elected officials"; to the decision of the Lumbard-Anderson panel in this case; and to the stipulation that contributions to the plan for non-elected persons were $1,628,921.

The provisions of the NMU Constitution which purported to permit appointments in lieu of elections (Segal brief, p. 10) had already been declared void in *Wirtz* v.

National Maritime Union of America, 399 F.2d 544 (2nd Cir., 1968), as violative of the LMRDA. There was no evidence that any payment had been made to the Officers' Plan for persons appointed to fill a vacancy for an unexpired term (Segal brief, p. 10).

Mr. Segal's argument (Segal brief, p. 11 *et seq.*) deals with what might have been rather than what was. But we are dealing with what was. The Officers' Plan was created by NMU for the "exclusive benefit of its elected officials" (SA51). The LMRDA provides that you cannot be an officer of a national or international union unless duly elected (Title 29 USC § 481(a); SA40). *Wirtz* v. *NMU,* 399 F.2d 544 (1968), held that "patrolmen", "field patrolmen" and "agents" must be elected. The Hays decision is not only at odds with the prior panel in this case but also is squarely at odds with the *Wirtz* holding.

II

The second circuit's decision not to sit *en banc* left unresolved an intracircuit conflict.

The second circuit had the power to sit *en banc* when this Court granted a writ of certiorari and reversed in *Maggio* v. *Zeitz,* 333 U.S. 56 (1948) (per *contra* Segal brief, p. 13). As a matter of practice, however, the second circuit had never sat *en banc* (333 U.S. 82, footnote 5) but always deferred to the prior panel. Judge Oakes in his dissent in *Eisen* v. *Carlisle,* 479 F.2d 1005 (1973), 1025 observed:

> "The Learned Hand court was apparently able never to sit en banc."

But what happened here is surely a novel situation. This is not the usual situation of a second panel deferring to an earlier one when it should not do so (*Maggio*). Here the second panel did not defer to an earlier panel when it should have.

III

The question really presented *(per contra,* Segal brief, Point II) is: may a LMRDA fiduciary intentionally allow the statute of limitations to expire against a union fund in favor of a person to whom he has made an unlawful payment without incurring personal liability therefor?

Mr. Segal erroneously says that this issue "was not seriously pursued in the courts below" (Segal brief, p. 13). This subject is more fully answered below.

Reply to the Defendant Karchmer

As to the trustees' personal liability for deliberately allowing the statute of limitations to expire against their trust with respect to the Brauch payment:

I

Mr. Karchmer is in error when he says, "Plaintiffs first surfaced the present issue before the Court of Appeals" (Karchmer brief, p. 2). The matter was gone into at the trial (660-661a; our petition, p. 16).

Mr. Karchmer (Karchmer brief, p. 4) is also in error when he states that it "was not until January 11, 1972 that the amendment was first judicially declared invalid and that subsequent payments thereunder by the trustees to non-elected officers were enjoined." The amendment was first judicially declared invalid on May 23, 1969. That decision should have placed the trustees on notice. But even if Mr. Karchmer were correct about the date, he, and his fellow trustees Freedman and Segal, still had over three months after January 11, 1972 to institute suit against Brauch and to prevent the statute from running against their trust.

II

When this action was instituted plaintiffs did not know what unlawful payments, if any, had been made by the trustees or to whom such payments had been made, or when such payments had been made. Accordingly, they could not have made the allegations in their complaint required by Subdivision (c) of Rule 19 of the Federal Rules of Civil Procedure (Karchmer brief, p. 8). They only knew that such payment to Perry had either been made or was imminent. Perry was joined as a defendant.

The trustees, on the other hand, had all this information readily at their disposal and could have joined those persons to whom they had made unlawful payments, or they could have instituted separate suits against such individuals. They did neither.

Rule 20 of the Federal Rules of Civil Procedure is the rule applicable here (permissive joinder) and not Rule 19.

Conclusion

It is again suggested that this Court may summarily reverse on the issues presented in the plaintiffs' cross-petition.

Respectfully submitted,

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